

**STATE OF MICHIGAN**  
**IN THE SUPREME COURT**

**MARCY HILL, Individually and as Next Friend  
of CHRISTOPHER HILL, a minor, and PATRICIA  
HILL,**

**Supreme Court Nos. 143329, 143348,  
143353**

**Plaintiffs-Appellees,**

**Court of Appeals No. 295071**

**-vs-**

**Macomb County Circuit Court  
No. 07-3755-NO**

**MARK PRITCHARD and TIMOTHY DAMERON,  
SEARS, ROEBUCK AND CO., a foreign corporation,  
SEARS LOGISTICS SERVICES, INC., a Delaware corporation,  
EXEL DIRECT, INC., a foreign corporation, MERCHANT  
DELIVERY, INC., a foreign corporation,**

**Defendants-Appellants,**

**and**

**CHARLES R. LINDSEY and ORALIA J. LINDSEY,  
and ALBERT KIMPE,**

**Defendants.**

---

**PLAINTIFFS-APPELLEES' SUPPLEMENTAL BRIEF SUBMITTED  
PURSUANT TO THE COURT'S OCTOBER 26, 2011 ORDER**

**CERTIFICATE OF SERVICE**

**MARK GRANZOTTO, P.C.**

**FRASER & SOUWEIDANE, PC**

**MARK GRANZOTTO (P31492)  
Attorney for Plaintiffs-Appellees  
225 South Troy Street, Suite 120  
Royal Oak, Michigan 48067  
(248) 546-4649**

**STUART A. FRASER (P29055)  
Attorney for Plaintiffs-Appellees  
10 S. Main Street, Suite 302  
Mount Clemens, MI 48046  
(586) 463-0100**

**FILED**

**APR 10 2012**

**CONNIE R. DAVIS  
CLERK  
MICHIGAN SUPREME COURT**

## TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES .....	iii
STATEMENT OF QUESTIONS PRESENTED .....	vii
COUNTERSTATEMENT OF FACTS .....	1
ARGUMENT .....	8
I.    PRITCHARD AND DAMERON OWED A COMMON LAW DUTY TO PLAINTIFFS THAT WAS SEPARATE AND DISTINCT FROM ANY CONTRACT THEY MAY HAVE ENTERED INTO .....	8
A.    The Relationship Of The Parties .....	13
B.    Foreseeability .....	18
C.    The Burden On The Defendant .....	22
D.    Nature Of The Risk Presented .....	24
E.    Conclusion .....	25
II.    THE CREATION OF A NEW DANGEROUS CONDITION .....	25
III.   THE DUTY OF SEARS AND EXEL .....	29
A.    Actual Agency .....	29
B.    Ostensible Agency .....	38
IV.    THE PROXIMATE CAUSE ISSUES RAISED IN DEFENDANTS' APPLICATIONS FOR LEAVE TO APPEAL .....	40
RELIEF REQUESTED .....	48
CERTIFICATE OF SERVICE	

## INDEX OF AUTHORITIES

<u><b>Cases</b></u>	<u><b>Page</b></u>
<i>Allen v Owens-Corning Fiberglass Corp.</i> , 225 Mich App 397; 571 NW2d 530 (1997) . . . . .	18
<i>Al-Shimmari v Detroit Medical Center</i> , 477 Mich 280; 731 NW2d 29 (2007) . . . . .	29
<i>Blackwell v Citizens Ins Co</i> , 457 Mich 662; 579 NW2d 889 (1998) . . . . .	11
<i>Boylan v Fifty Eight Limited Liability Co</i> , 289 Mich App 709; 808 NW2d 277 (2010) . . . . .	15
<i>Brinker v Koenig Kohl &amp; Supply Company</i> , 312 Mich 534; 20 NW2d 301 (1945) . . . . .	31
<i>Buczowski v McKay</i> , 441 Mich 96; 490 NW2d 330 (1992) . . . . .	8, 12
<i>Caldwell v Cleveland Cliffs Iron Co.</i> , 111 Mich App 721; 315 NW2d 186 (1982) . . . . .	32
<i>Campbell v Kovich</i> , 273 Mich App 227; 731 NW2d 112 (2007) . . . . .	31
<i>Caramagno v Tuchel</i> , 173 Mich 167; 433 NW2d 389 (1988) . . . . .	30
<i>Clark v Dahlman</i> , 379 Mich 251; 150 NW2d 755 (1967) . . . . .	10
<i>Comstock v General Motors Corp.</i> , 358 Mich 163; 99 NW2d 627 (1999) . . . . .	18, 42, 44
<i>Davis v Thornton</i> , 384 Mich 138; 180 NW2d 11 (1970) . . . . .	42
<i>DeNike v Otsego County</i> , 45 Mich 711; 206 NW2d 786 (1973) . . . . .	30
<i>Dumka v Quaderer</i> , 151 Mich App 68; 390 NW2d 200 (1986) . . . . .	27
<i>Ellis v McNaughton</i> , 76 Mich 237; 42 NW1113 (1989) . . . . .	27
<i>Falcon v Memorial Hospital</i> , 436 Mich 443; 462 NW2d 44 (1990) . . . . .	13
<i>Farwell v Keaton</i> , 396 Mich 281; 240 NW2d 217 (1976) . . . . .	27
<i>Fleegar v Consumers Power Co</i> , 262 Mich 537; 247 NW2d 741 (1933) . . . . .	14
<i>Frazier v Allstate Ins Co</i> , 489 Mich 955; 798 NW2d 506 (2011) . . . . .	7
<i>Fultz v Union Commerce Associates</i> , 470 Mich 460; 683 NW2d 587 (2004) . . . . .	6, 8

<i>Gadde v Michigan Consolidated Gas Co</i> , 377 Mich 117; 139 NW2d 722 (1966) .....	14
<i>Girvan v Fuelgas Co</i> , 238 Mich App 703; 607 NW2d 116 (2000) .....	14
<i>Glittenberg v Doughboy Recreational Industries (On Rehearing)</i> , 441 Mich 379; 491 NW2d 208 (1992) .....	16
<i>Gregory Cincinnati Ins.</i> , 450 Mich 1; 538 NW2d 325 (1995) .....	16
<i>Grinnell v Carbide &amp; Carbon Chemicals Corp</i> , 282 Mich 509; 276 NW2d 535 (1937) .....	14
<i>Hall v State of Michigan</i> , 109 Mich App 592; 311 NW2d 813 (1981) .....	46
<i>Hart v Ludwig</i> , 347 Mich 559; 79 NW2d 895 (1956) .....	26
<i>Hertz Corp v Volvo Truck Corporation</i> , 210 Mich App 243; 533 NW2d 15 (1995) .....	30
<i>Hickey v Zezulka</i> , 439 Mich 408; 487 NW2d 106 (1992) .....	42
<i>Howard v Park</i> , 37 Mich App 496; 195 NW2d 39 (1972), quoting <i>Stanhope v Los Angeles College of Chiropractic</i> , 54 Cal App 2d 141; 128 P2d 705 (1942) .....	39
<i>Huhtala v Travelers Insurance Company</i> , 401 Mich 118; 257 NW2d 640 (1977) .....	15
<i>James v Alberts</i> , 464 Mich 12; 626 NW2d 158 (2001) .....	9, 18
<i>Jenkins v Raleigh Trucking Services, Inc.</i> , 187 Mich App 424; 468 NW2d 64 (1991) .....	31
<i>Khalaf v Bankers &amp; Shippers Ins Co.</i> , 404 Mich 134; 273 NW2d 811 (1978) .....	11
<i>Kwiatkowski v Coachlight Estates of Blissfield, Inc.</i> , 480 Mich 1062; 743 NW2d 917 (2008) ..	9
<i>Lewis v Summers</i> , 295 Mich 20; 294 NW 82 (1940) .....	31
<i>Lincoln v Fairfield-Nobel Co</i> , 76 Mich App 514; 257 NW2d 148 (1977) .....	30
<i>Little v Howard Johnson</i> , 183 Mich App 675; 455 NW2d 390 (1990) .....	39
<i>Loweke v Ann Arbor Ceiling &amp; Partition Co.</i> , 489 Mich 157; ___ NW2d ___ (2011) .....	9
<i>Maiden v Rozwood</i> , 461 Mich 109; 597 NW2d 817 (1999) .....	38

<i>Marchand v Russell</i> , 257 Mich 96; 241 NW 209 (1932) .....	30
<i>McClaine v Alger</i> , 150 Mich App 306; 388 NW2d 349 (1986) .....	46
<i>McMillan v State Highway Commission</i> , 426 Mich 46; 393 NW2d 332 (1986) .....	18
<i>McMillian v Vliet</i> , 422 Mich 570; 374 NW2d 679 (1985) .....	42
<i>Meretta v Reach</i> , 195 Mich App 695; 491 NW2d 278 (1992) .....	30
<i>Michigan Sugar Co v Employers Mutual Liability Ins Co of Wisconsin</i> , 107 Mich App 9; 308 NW2d 684 (1981) .....	46
<i>Miskiewicz v Smolenski</i> , 249 Mich App 63; 227 NW 789 (1929) .....	30
<i>Moning v Alfono</i> , 400 Mich 425; 254 NW2d 759 (1977) .....	15, 18
<i>Moody v Pulte Homes, Inc.</i> , 423 Mich 150; 378 NW2d 319 (1985) .....	10
<i>Nash v Sears Roebuck &amp; Co</i> , 383 Mich 136; 174 NW2d 818 (1970) .....	26
<i>Neibarger v Universal Cooperatives, Inc.</i> , 439 Mich 512; 486 NW2d 612 (1992) .....	15
<i>Parks v Starks</i> , 342 Mich 443; 70 NW2d 805 (1955) .....	46
<i>Parks v Starks</i> , 342 Mich 443; 70 NW2d 805 (1995) .....	44
<i>Persinger v Holst</i> , 248 Mich App 499; 639 NW2d 594 (2001) .....	30
<i>Richards v Pierce</i> , 162 Mich App 308; 412 NW2d 725 (1987) .....	44
<i>Riddle v McLouth Steel Products Corp</i> , 440 Mich 85; 485 NW2d 676 (1992) .....	10
<i>Rinaldo's Construction Corp v Michigan Bell Tel Co.</i> , 454 Mich 65; 559 NW2d 647 (1997) ...	9
<i>Ross v Glaser</i> , 220 Mich App 183; 559 NW2d 331 (1997) .....	44
<i>Saums v Parfet</i> , 270 Mich 165; 258 NW 235 (1935) .....	32
<i>Schechter v Merchants Home Delivery, Inc.</i> , 892 A2d 415 (DC App 2006) .....	38
<i>Schultz v Consumers Power Co.</i> , 443 Mich 445; 506 NW2d 175 (1993) .....	13, 18, 44

<i>Scott v Allen Bradley Co.</i> , 139 Mich App 665; 362 NW2d 734 (1985) .....	44
<i>Skinner v Square D Co</i> , 445 Mich 153; 516 NW2d 475 (1994) .....	41
<i>Sliter v Cobb</i> , 388 Mich 202; 200 NW2d 67 (1972) .....	29
<i>Smith v Webster</i> , 23 Mich 298 (1871) .....	29
<i>St. Clair Intermediate School District v IEA/MEA</i> , 458 Mich 540; 581 NW2d 707 (1988) ...	30
<i>Stanhope v Los Angeles College of Chiropractic</i> , 54 Cal App 2d 141; 128 P2d 705 (1942) ....	39
<i>Sutter v Biggs</i> , 377 Mich 80; 139 NW2d 684 (1966) .....	45
<i>Taylor v Wyeth Laboratories</i> , 139 Mich App 389; 362 NW2d 295 (1985) .....	44
<i>Tucker v Pipitone</i> , 489 Mich 984; 799 NW2d 557 (2011) .....	26
<i>Tuttle v Embury-Martin Lumber Co.</i> , 192 Mich 385; 158 NW 875 (1916) .....	31
<i>Utley v Taylor &amp; Gaskin, Inc.</i> , 305 Mich 561; 9 NW2d 842 (1943) .....	31
<i>Van Pelt v Paull</i> , 6 Mich App 618; 150 NW2d 185 (1967) .....	32
<i>Vannett v Michigan Public Service Co</i> , 289 Mich 212; 286 NW2d 216 (1939) .....	14
<i>Vargo v Saver</i> , 457 Mich 49; 576 NW2d 656 (1998) .....	30
<i>Williams v Cunningham Drug Stores, Inc.</i> , 429 Mich 495; 418 NW2d 381 (1988) .....	27
<i>Young v EW Bliss Co.</i> , 130 Mich App 363; 343 NW2d 553 (1983) .....	44
<i>Young v Lee</i> , 310 Mich 42; 16 NW2d 659 (1944) .....	14

#### **Other Authorities**

2 Restatement Torts, 2d, §449 .....	42
-------------------------------------	----

## **STATEMENT OF QUESTIONS PRESENTED**

- I. SHOULD THIS COURT DECLINE PRITCHARD'S AND DAMERON'S REQUEST TO REVIEW THE COURT OF APPEALS MAY 24, 2011 DETERMINATION THAT THEY OWED A DUTY OF DUE CARE TO THE PLAINTIFFS?

Plaintiffs-Appellees say "Yes".

Defendants-Appellants says "No".

- II. SHOULD THIS COURT DECLINE PRITCHARD'S AND DAMERON'S REQUEST TO REVIEW SINCE, IN ADDITION TO OTHER COMMON LAW DUTIES THAT THEY OWED PLAINTIFFS, THEY ALSO BREACHED A DUTY TO AVOID MAKING PLAINTIFFS' SITUATION DANGEROUS?

Plaintiffs-Appellees say "Yes".

Defendant-Appellant says "No".

- III. SHOULD THIS COURT DENY LEAVE TO APPEAL ON THE QUESTION OF WHETHER THE CORPORATE DEFENDANTS OWED A DUTY TO PLAINTIFFS?

Plaintiffs-Appellees say "Yes".

Defendant-Appellant says "No".

- IV. SHOULD THIS COURT DENY LEAVE TO APPEAL ON DEFENDANTS' CLAIM THAT THEIR NEGLIGENCE WAS NOT A PROXIMATE CAUSE OF PLAINTIFFS' INJURIES?

Plaintiffs-Appellees say "Yes".

Defendant-Appellant says "No".

### **COUNTERSTATEMENT OF FACTS**

This case arises out of a fiery explosion of Marcy Hill's Clinton Township home in the early morning hours of May 21, 2007. Mrs. Hill and both of her children, Christopher and Patricia, were severely injured in the explosion and resulting fire. The immediate cause of that explosion was the leakage of natural gas from an uncapped gas line concealed behind an electric clothes dryer located in the home's kitchen.

The factual background relevant to this case stretches back several years prior to the explosion. Mrs. Hill bought her home in August 2003 from Charles and Oralia Lindsey. Deposition of Marcy Hill, at 25. The Lindseys, in turn, had purchased the home from Albert and Delores Kimpe in April 2000. Deposition of Charles Lindsey, at 6.

When the Kimpkes moved into the house, they had an electric clothes dryer. Deposition of Albert Kimpe, at 5. However, in 1996, they decided to install a gas furnace and hired a company to bring a gas line into the house. *Id.*, at 17, 20, 27. In installing the furnace, the contractor also put in extra piping and shut off valves to allow the installation of other gas appliances, such as a gas water heater or dryer.

Mr. Kimpke later ran a gas line from the furnace area into the kitchen where the washer and dryer were located. *Id.*, at 18, 28, 31. The shut-off valve for that line was located some distance away from the dryer, in a small utility room off the kitchen. *Id.*, at 38. Mr. Kimpe purchased a gas dryer which he hooked up to the line himself. *Id.*, at 18. Mr. Kimke's installation of the dryer was in violation of the National Fuel Gas Code, which requires that a manual shut-off valve be located within six feet of a gas dryer.

When the Lindseys purchased the home in 2000, that sale included the Kimpes' gas clothes

dryer. Lindsey Dep., at 6. The Lindseys used that dryer throughout the time they lived in the house. They had no problems with the dryer and they did not move, unplug, or disconnect it at any time. *Id.*, at 7, 13-14, 19.

When the Lindseys sold the home to Mrs. Hill in 2003, Mrs. Hill wanted to purchase the Lindseys' gas dryer as well. The Lindseys, however, decided to remove the dryer and take it with them. *Id.*, at 7, 38. In the course of the removal of the dryer, the gas line to which it had been connected was left uncapped. The existence of such an uncapped gas line following the removal of a gas appliance is a condition that violates the National Fuel Gas Code. Under that Code, when Mr. Lindsey removed the dryer he was required to seal the gas line with a cap.

At the time she bought her home, Mrs. Hill knew nothing about the appliance hook-ups in the house or whether the dryer removed by the Lindseys had been gas or electric. Deposition of Marcy Hill at 16-17, 57-58, 78-79. What she did know was that she needed a new washer and dryer to take care of her family's laundry.

In September 2003, the month after purchasing her house, Mrs. Hill went to a nearby Sears store to purchase these appliances. *Id.*, at 15-16, 18. For reasons of economy, Mrs. Hill decided to buy an electric dryer. *Id.*, at 17. As part of her purchase, she arranged for Sears to deliver and install the appliances in her home. *Id.*, at 18-20, 74-76. In the course of buying the washer and dryer the Sears salesperson asked Mrs. Hill if she had a proper electric outlet for the dryer, but Mrs. Hill did not know. *Id.*, at 19. The salesperson assured her that Sears would take care of that, if needed, when it delivered and installed the dryer. *Id.*, at 19-20.

Mrs. Hill had no idea what was in the house in terms of gas or electric lines, or what might be required to hook-up the washer and dryer. *Id.*, at 16-17, 57-58, 78-79. She assumed that all of

these matters relating to the hook-up would be handled by Sears when these appliances were delivered. *Id.* at 18. In the short time she had lived in the house, Mrs. Hill had never paid attention to whether there were any pipes in the kitchen where the washer and dryer would be located.

The electric washer and dryer were delivered to the Hills' home on September 8, 2003. The two men responsible for the delivery and installation were Mark Pritchard and Timothy Dameron. They placed the washer and dryer in the kitchen of Mrs. Hills' home, in the same space that the previous owners had their washer and dryer. The placement of the washer and dryer concealed the uncapped gas line that was located in this space. Mr. Pritchard and Mr. Dameron made no effort to cap the gas line, nor did they advise Mrs. Hill of the existence of the uncapped line. *Id.*, at 22-24. After the dryer was placed in Ms. Hill's kitchen in September 2003 it was never moved. *Id.*, at 24.

On May 19, 2007, the kitchen faucet in Mrs. Hills' home broke. She decided to replace the faucet herself. *Id.*, at 29-30. In attempting this home repair, Mrs. Hill experienced various difficulties that complicated her task. In an attempt to solve these problems, Mrs. Hill went to a local home improvement store on two occasions for additional parts and instructions. *Id.*, at 32-35, 40. Mrs. Hill's most immediate problem in attempting to replace the faucet was that she was unable to turn off the flow of water. There was a water shut-off valve under the kitchen sink, but that valve was not functioning properly. *Id.*, at 34-35. An employee of the home improvement store where she sought advice explained to Mrs. Hill that, since the shut-off valve under the sink was not working, she would have to turn off the house's main water supply. Mrs. Hill was told that she would find this main valve behind her furnace. *Id.*, at 35-36.

Based on this advice, Mrs. Hill went into the dark utility closet where the furnace and hot water tank were located. *Id.*, at 36, 45, 56. In that closet she located several straight-arm valves on

pipes that she believed were for water. *Id.*, at 36-38, 56. Mrs. Hill tried turning these valves, but the water to her faulty faucet still would not shut off. As she turned the valves behind her furnace, Mrs. Hill began to smell gas. When she smelled gas, she thought she must have done something wrong, either with respect to the furnace, the nearby hot water heater or because she might have opened a gas line. She immediately turned the valves back to what she believed to be their original closed positions. *Id.*, at 38-39, 45. While there was still a lingering gas odor, it seemed to Mrs. Hill that the gas had stopped leaking and the smell was beginning to fade after she closed the valve.

At approximately 8:00 that evening, Mrs. Hills' son went to take a shower. He discovered that there was no hot water. Mrs. Hill had to re-light the pilot on the hot water heater. She had done this before and, as usual, she smelled a little gas when she lit the pilot, but the smell went away and she was able to relight the pilot. *Id.*, at 43-44. By the time Mrs. Hill and her son went to bed that night at approximately 10:30 p.m., she no longer smelled gas and had not smelled it for some time. *Id.*, at 43, 68.

On May 20, 2007, Mrs. Hills' daughter, Patricia, worked her usual 4:00 - 10:00 shift at a local Starbucks. When she returned home from work, Patricia smelled gas near the dryer, coming through the door from outside into the kitchen. Deposition of Patricia Hill, at 12-14. The gas smell faded and she did not smell it again after that. *Id.*, at 13, 15. Patricia was home for approximately one hour before she left to go to a party. She did not smell gas when she left the house, and had never smelled it other than the brief time after she arrived home from work. *Id.*, at 15.

Patricia returned home from the party at approximately 3:00 a.m. on May 21, 2007. *Id.*, at 18. On her return, she did not smell gas. *Id.*, at 21. Patricia walked into the living room, where she took a lighter from her purse to light a candle. The moment she lit her lighter, the house exploded.

*Id.*, at 22-23. Mrs. Hill and both of her children suffered severe injuries as a result of the explosion. Photos taken during the investigation that followed confirmed that the gas line behind the dryer was not capped and that there was no local shut-off valve on that line behind the dryer.

Mrs. Hill, both individually and as next friend of her son, Chris, and Patricia Hill filed this negligence action in the Macomb County Circuit Court on August 28, 2007 for the injuries they sustained in the May 21, 2007 explosion. For purposes of this appeal, there were essentially three defendants named in the complaint: (1) Sears, Roebuck and Company (hereinafter: "Sears"), which sold the dryer to Mrs. Hill and agreed to install it in her home; (2) the company to which Sears delegated the work of installing the dryer, Exel Direct, Inc. (hereinafter: "Exel");<sup>1</sup> and (3) the two men responsible for that installation, Mark Pritchard and Timothy Dameron.

The Hills alleged in their complaint that the defendants were negligent in installing the dryer in an unsafe location, near a source of flammable vapors (the uncapped gas line) in violation of Sears' own installation guidelines. The complaint further claimed that the defendants were negligent in placing the dryer in front of the gas line without capping that line or even advising the Hills of the fact that it was uncapped, despite the fact that they knew or should have known of the danger of a potential leak presented by the uncapped line. Plaintiffs further asserted that the defendants had increased the danger presented by the uncapped line by concealing it behind the dryer.

In January 2009, Exel filed a motion for summary disposition in which it argued that it owed no duty to plaintiffs under the facts of this case. Exel also argued that it could not be held responsible for any negligence committed by Pritchard or Dameron. Exel further contended that it

---

<sup>1</sup>Exel and Merchant Delivery, Inc., another defendant named in the complaint, are essentially the same company. These two companies will be referred to herein solely as Exel.

was entitled to summary disposition on the proximate cause component of plaintiffs' case. Sears filed a concurrence in Exel's motion.

In response to these motions, plaintiffs relied on the deposition testimony provided by several witnesses. Plaintiff also presented an affidavit signed by their safety analysis expert, Dr. Ralph Barnett. A copy of that affidavit is attached hereto as Exhibit A. Dr. Barnett indicated in that affidavit that the men who installed the dryer in the Hills' home were either aware of or should have been aware of the significant hazard associated with placing a dryer in the immediate vicinity of an uncapped gas line. Barnett Affidavit (Exhibit A), ¶3. Dr. Barnett further indicated that, when they confronted an uncapped gas line, the installers of the dryer should either have capped the gas line, refrained from installing the dryer and/or notified plaintiffs of the uncapped line and the dangers it presented. *Id.*, ¶9a, b.

Following briefing and oral argument, the circuit court issued an opinion on March 18, 2009, denying Exel's motion. *See* Exel Application for Leave, Appendix 2. The circuit court held in that opinion that material questions of fact remained precluding summary disposition.

In September 2009, Pritchard and Dameron filed their own motion for summary disposition. In that motion, these two defendants asserted that they could not be liable for the plaintiffs' injuries on the basis of this Court's decision in *Fultz v Union Commerce Associates*, 470 Mich 460; 683 NW2d 587 (2004). Based on *Fultz*, Pritchard and Dameron contended that they owed no duty to plaintiffs since they undertook installation of the washer and dryer under the terms of a contract.

On October 26, 2009, the circuit court issued a written opinion denying the summary disposition motion filed by Pritchard and Dameron. *See* Exel Application for Leave, Appendix 5.

Pritchard and Dameron filed an application for leave to appeal in the Michigan Court of

Appeals, seeking review of the circuit court's October 26, 2009 ruling. That application was granted by a panel of the Court of Appeals in a March 18, 2010 order. Exel and Sears filed cross-appeals. In these cross appeals Exel and Sears challenged the circuit court's denial of their previously filed motion for summary disposition.

A panel of the Court of Appeals issued an unpublished decision in this case on May 24, 2011. Exel Application, Appendix 1. In that opinion, the panel affirmed the circuit court's denial of the defendants' motions for summary disposition.

The defendants filed applications for leave to appeal in this Court, seeking review of the May 24, 2011 decision of the Michigan Court of Appeals. On October 26, 2011, this Court issued an order directing the Clerk to schedule oral argument on these applications. *Hill v Sears Roebuck & Company*, 490 Mich 896; 804 NW2d 553 (2011). In its October 26, 2011 order, the Court instructed the parties to be prepared to address three questions:

(1) whether the defendant installers of the electrical appliance, Mark Pritchard and Timothy Dameron, had a duty to the plaintiffs with respect to the uncapped gas line in their home that was separate and distinct from their contractual duty to properly and safely install the electrical appliance; (2) whether these defendant installers created a new dangerous condition with respect to the uncapped gas line, or made an existing dangerous condition more hazardous; and (3) whether defendants-appellants Sears Roebuck & Company, Sears Logistic Services, Inc., Exel Direct, Inc., and Merchant Delivery, Inc., breached any duty owed to the plaintiffs.

*Id.*

The Court further invited the parties to submit supplemental briefs addressed to these issues. This brief is being submitted in response to the Court's October 26, 2011 order.

## ARGUMENT

Before proceeding to address the issues that this Court has set out in its October 26, 2011 order, there is an important preliminary that needs to be stressed. As the Court's order acknowledges, the central issue presented in this case concerns the negligence concept of duty. In addressing this duty question it is essential to "distinguish between duty as the problem of the relational obligation between the plaintiff and defendant, and the standard of care that in negligence cases is always reasonable conduct." *Buczowski v McKay*, 441 Mich 96, 100; 490 NW2d 330 (1992). The defendants arguments during the course of the appeal process have intermingled the defendants' duty and the defendants' negligence. The question in this appeal is *not* whether Pritchard and Dameron breached the standard of care when they delivered and installed the dryer to the Hills' home. Nor is this Court presented with the question of whether Mrs. Hill was responsible for some degree of comparative fault. Whether the defendants acted in a manner consistent with what a reasonable person would have done under the circumstances is *not* relevant to this appeal. Thus, all of defendants' assertions that defendants were not negligent are completely irrelevant to the duty issue presented here.

### **I. PRITCHARD AND DAMERON OWED A COMMON LAW DUTY TO PLAINTIFFS THAT WAS SEPARATE AND DISTINCT FROM ANY CONTRACT THEY MAY HAVE ENTERED INTO.**

The first issue that the Court has asked the parties to address is whether Pritchard and Dameron owed a duty to the plaintiffs. In a very real sense, the duty issue that the Court will consider has not been briefed in the courts below. This is because the duty issue raised and decided in the circuit court and the Court of Appeals concerned the reach of this Court's decision in *Fultz v Union-Commerce Associates*, 470 Mich 460; 683 NW2d 587 (2004), and various Court of Appeals

decisions (mis)construing that case.

On June 6, 2011, two weeks after the Court of Appeals rendered its decision in this case, this Court decided *Loweke v Ann Arbor Ceiling & Partition Co.*, 489 Mich 157; \_\_\_ NW2d \_\_\_ (2011). The Court's decision in *Loweke* significantly clarified the holding in *Fultz*.

In *Fultz*, the plaintiff was injured when she fell in a snow covered parking lot. Plaintiff sued both the property owner and the company that was contractually responsible for removing the snow from that lot.<sup>2</sup> That company failed to plow the snow on the day that plaintiff fell, despite the fact that it was contractually obligated to do so. Plaintiff in *Fultz* asserted that the duty owed to her by the snow removal company arose out of its contractual obligation to the property owner.

This Court held in *Fultz* that the plaintiff could not establish the duty element of her negligence claim against the snow removal company because "a tort action will not lie when based solely on the nonperformance of a contractual duty." 470 Mich at 466. Thus, the *Fultz* court found that the duty necessary to support a claim in negligence had to be based on "violation of a duty separate and distinct from the contractual obligation." *Id.*, at 467, quoting *Rinaldo's Construction Corp v Michigan Bell Tel Co.*, 454 Mich 65, 84; 559 NW2d 647 (1997).

---

<sup>2</sup>In *Fultz*, the plaintiff's claim against the property owner was a premises liability action; her claim against the snow removal company was not. This obvious point is of passing interest here only because Exel has devoted a section of its application for leave to the assertion that plaintiffs' claims herein represent theories of premises liability. Exel Application, at 19-23. In light of the fact that none of the defendants were owners of the Hills' property, it is difficult to understand how Exel can make such a claim. Moreover, even if the defendants were owners of the property where the explosion occurred, this would still not be a premises liability claim. A premises liability claim is predicated on a condition of the property itself; it is not an action that is based on a negligent activity that takes place on property. See *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001); *Kwiatkowski v Coachlight Estates of Blissfield, Inc.*, 480 Mich 1062; 743 NW2d 917 (2008). The negligence involved in this case concerns the defendants' conduct, not the condition of a piece of property.

While the *Fultz* Court determined that the complete nonperformance of a contract would not, in itself, create a duty in tort, the *Fultz* court did not challenge the traditional sources of such a tort duty. In *Clark v Dahlman*, 379 Mich 251; 150 NW2d 755 (1967), this Court described the potential sources of a cognizable duty:

Actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law. The duty may arise specifically by mandate of statute, or it may arise generally by operation of law under application of the basic rule of the common law, which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others. This rule of the common law arises out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another.

Such duty of care may be a specific duty owing to the plaintiff by the defendant, or it may be a general one owed by the defendant to the public, of which the plaintiff is a part. Moreover, while this duty of care, as an essential element of actionable negligence, arises by operation of law, it may and frequently does arise out of a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract.

*Id.*, at 260-261.

Thus, *Clark* and a number of this Court's decisions confirm that a duty in tort may arise out of the negligent performance of a contract or under the broader principle of the common law "which imposes on every person engaged in the prosecution of any undertaking an obligation of due care . . ." *Id.* at 261; see also *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992); *Moody v Pulte Homes, Inc.*, 423 Mich 150, 181, n. 15; 378 NW2d 319 (1985).

The *Fultz* decision did not disturb the well established common-law duty described in each of these cases. To the contrary, the *Fultz* Court cited with favor the above-quoted language from *Clark*. 470 Mich 465. However, a number of Court of Appeals decisions subsequent to *Fultz*

significantly eroded *Clark*'s conception of a common-law duty of due care in every undertaking. It was these post-*Fultz* Court of Appeals decisions that prompted the *Loweke* Court's clarification of the applicable law with respect to duty.

While acknowledging *Fultz*'s requirement of a duty that is separate and distinct from contract, the *Loweke* Court stressed that *Fultz* did not break with the common-law duty as set out in earlier cases such as *Clark*:

Determining whether a duty arises separately and distinctly from the contractual agreement, therefore, generally does not necessarily involve reading the contract, noting the obligations required by it, and determining whether the plaintiff's injury was contemplated by the contract. Instead, *Fultz*'s directive is to determine whether a defendant owes a noncontracting, third-party plaintiff a legal duty apart from the defendant's contractual obligations to another. As this Court has historically recognized, a separate and distinct duty to support a cause of action in tort can arise by statute, or by a number of preexisting tort principles, including duties imposed because of a special relationship between the parties *and the generally recognized common-law duty to use due care in undertakings*.

489 Mich at 169-170 (emphasis added).

*Loweke*, therefore, reaffirmed the fact that, "[e]ntering into a contract with another pursuant to which one party promises to do something does not alter the fact that there was a preexisting obligation or duty to avoid harm when one acts." *Rinaldo's Construction*, 454 Mich at 84; *Moody v Pulte Homes, Inc.*, 423 Mich at 181, n. 15; *Khalaf v Bankers & Shippers Ins Co.*, 404 Mich 134, 143; 273 NW2d 811 (1978); *Blackwell v Citizens Ins Co*, 457 Mich 662, 668, n. 4; 579 NW2d 889 (1998). It is this well recognized common-law obligation "to use due care in undertakings," *Loweke*, 489 Mich a 170, that compels the conclusion that Pritchard and Dameron owed a duty to the plaintiffs.

In this case, the negligence alleged against Pritchard and Dameron occurred during the course

of an undertaking - the delivery and installation of appliances in the plaintiffs' home. Under well established Michigan law reaffirmed as recently as last year in *Loweke*, these two defendants owed plaintiffs a duty to complete their undertaking in a nonnegligent manner.<sup>3</sup>

Quite apart from the recognized common-law duty that attaches to any undertaking, there is an additional reason why a duty must be imposed on Pritchard and Dameron under the facts of this case. Duty in the law of negligence "is not sacrosanct in itself but is only an expression of the sum total of those considerations of policy which lead the law to say that plaintiff is entitled to protection." *Buczkowski v McKay*, 441 Mich 96, 100-101; 490 NW2d 330 (1992); *In Re Certified Question From The Fourteenth District Court of Appeals of Texas*, 479 Mich 498, 505; 740 NW2d 206 (2007). This Court described the factors that are to be considered in determining the existence of a tort duty in *In Re Certified Question*:

the ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing a duty outweigh the social costs of imposing a duty. The inquiry involves considering, among any other relevant considerations, the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented.

479 Mich at 505.

In *In Re Certified Question*, the Court identified four factors that are to be addressed in imposing a duty on a defendant. In this case, all four of the *In Re Certified Question* considerations support the finding that Pritchard and Dameron owed a common-law duty of due care to plaintiffs.

---

<sup>3</sup>In their application for leave to appeal, Pritchard and Dameron certainly appear to grasp the significance of the well established common-law principle that accompanying every undertaking is a duty to perform that undertaking in a nonnegligent manner. These two defendants state in their application, "the performance of the contract may have given rise to a duty to act with care *in the undertaking contemplated by the contract*. . . Application for Leave, at 12.

### A. The Relationship Of The Parties.

The Court held in *In Re Certified Question* that the most important of the four considerations it identified is the relationship between the parties. *Id.*; see also *Schultz v Consumers Power Co.*, 443 Mich 445, 450; 506 NW2d 175 (1993). Here, there is a direct relationship between Pritchard and Dameron and the plaintiffs. These two defendants entered plaintiffs' property for the purposes of delivering and installing the dryer that Mrs. Hill had purchased. They were directly involved in the transporting of the appliance to plaintiffs' home and they were responsible for installing it. It was during that process that Pritchard and Dameron were either aware of or should have become aware of the uncapped gas lines and the danger that such a condition might present.

Once they entered plaintiffs' home and undertook the work of installing the dryer - a task that foreseeably affected plaintiffs' physical well-being, as well as the enjoyment of their home - Pritchard and Dameron had a direct relationship with plaintiffs, separate from any contract that they may have had with a third party. That relationship carried with it an obligation, *i.e.* a duty, to perform all of the work involved with reasonable care. Under the most basic principles of negligence law, there was unquestionably a relationship sufficient to impose a duty on Mr. Pritchard and Mr. Dameron.<sup>4</sup>

---

<sup>4</sup>The relationship that existed between the two individual defendants and plaintiffs should be contrasted with the more difficult duty-based questions that are presented in other cases. This Court observed in *Falcon v Memorial Hospital*, 436 Mich 443; 462 NW2d 44 (1990), "[i]n an ordinary tort action seeking recovery for physical harm, the defendant is a stranger to the plaintiff and the duty imposed by operation of law is imposed independently of any undertaking by the defendant." *Id.* at 458. As noted in *Falcon*, a common-law duty in tort may be recognized where the parties are complete strangers and the defendant has undertaken no services for the plaintiff. Here the relationship between the plaintiffs and Pritchard and Dameron is much closer than the relationship discussed in *Falcon*. In this case, the parties were not complete strangers and the two individual defendants undertook services for Mrs. Hill that brought them into her home.

In an analogous setting, this Court has found a duty to exist based on the defendant's entry into the plaintiff's property. In a series of cases, this Court has considered the duty owed to a consumer by a supplier of electricity or gas. In those cases, this Court has held that the existence of a duty is dependent on whether the defendant came onto the plaintiff's property to install or repair gas or electric appliances. See, e.g., *Gadde v Michigan Consolidated Gas Co*, 377 Mich 117; 139 NW2d 722 (1966), *Young v Lee*, 310 Mich 42; 16 NW2d 659 (1944), *Vannett v Michigan Public Service Co*, 289 Mich 212, 217; 286 NW2d 216 (1939), *Grinnell v Carbide & Carbon Chemicals Corp*, 282 Mich 509; 276 NW2d 535 (1937); *Fleegar v Consumers Power Co*, 262 Mich 537; 247 NW2d 741 (1933).

The holdings in these cases were summarized in the Court of Appeals decision in *Girvan v Fuelgas Co*, 238 Mich App 703, 714; 607 NW2d 116 (2000). Speaking through then-Judge Zahra, the Court in *Girvan* recognized that a gas or electric company would generally not have a duty to inspect the lines and appliances inside the premises of users of its commodity to determine whether a dangerous condition existed. However, the *Girvan* Court recognized that where a supplier comes onto the premises of a customer and performs services within its area of expertise, liability may be imposed based on a defective installation or repair of gas or electric equipment inside the user's premises. Drawing from this Court's decisions in *Fleeger*, *Gadde* and *Young*, the Court of Appeals ruled in *Girvan*:

In each of the cases cited, the gas supplier agreed to enter the plaintiff's premises and perform services within the gas supplier's professed area of expertise. In each instance the gas supplier was negligent in performing the function it agreed to perform. Michigan courts have imposed a similar duty on the suppliers of electricity.

*Girvan*, 238 Mich App at 712.

Although such cases as *Gadde*, *Young* and *Girvan* address the duties of suppliers of gas and electricity with respect to installation of gas and electric appliances, there is no reason to distinguish between a gas or electric company engaged in the installation of an appliance and a company, such as Sears, that agrees to install an appliance after selling that appliance to a consumer. *Cf Boylan v Fifty Eight Limited Liability Co*, 289 Mich App 709; 808 NW2d 277 (2010) (finding a duty separate and distinct from defendant's installation contract because defendant "bore a duty to exercise reasonable care when it entered into and altered private property").

There is, however, another important consideration bearing on the relationship between Mrs. Hill and the defendants that supports the imposition of a duty of due care. In this case, Mrs. Hill was a consumer who purchased a product from a supplier of that product and she also arranged for the installation of that product in her home. Michigan tort law has consistently been solicitous of the interests of consumers. For example, this Court recognized in *Huhtala v Travelers Insurance Company*, 401 Mich 118; 257 NW2d 640 (1977):

The relationship of the supplier of services with the consumer, although contractual in inception, gave rise to a duty imposed by law on the supplier, apart from the terms of their agreement, to take reasonable safeguards to protect the consumer.

*Id.* at 130.

This special concern for the safety of consumers is most often reflected in the law of product liability. The duty of a manufacturer or supplier of a product marketed to consumers has been broadly construed: placing a product on the market "creates the requisite relationship between a manufacturer, wholesaler and retailer and persons affected by use of the product giving rise to a legal obligation or duty to the persons so affected." *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977); *cf Neibarger v Universal Cooperatives, Inc.*, 439 Mich 512, 523; 486 NW2d 612 (1992)

(holding that a duty in the product liability setting is “imposed by law or from policy considerations which allocate the risk of dangerous and unsafe products to the manufacturer and seller rather than the consumer.”)

What is of particular importance in the context of this case is *why* the courts of this state have imposed a broad duty of due care on the manufacturers and suppliers of consumer goods. Such a duty exists because the manufacturer or supplier has both greater control over the product and superior knowledge of the dangers that might be associated with that product. This Court has, for instance, imposed on product manufacturers a duty to warn “where the manufacturer or seller has superior knowledge of the product’s dangerous characteristics . . .” *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 391; 491 NW2d 208 (1992); *Gregory Cincinnati Ins.*, 450 Mich 1, 18, n. 19; 538 NW2d 325 (1995) (“We imposed a duty to warn of a dangerous condition because a manufacturer has superior knowledge of a dangerous condition present at the time of sale.”)

The negligence alleged in this case is centered in large part on the fact that Pritchard and Dameron, as installers of both gas and electric appliances, had a level of sophistication superior to that of the plaintiffs. The significance of the defendants’ superior knowledge was addressed in the deposition testimony provided by David Stayer, plaintiffs’ expert on the cause of the fire. Mr. Stayer testified:

My opinion is that installers are hired because they have a certain level of knowledge and expertise, let’s say, more than the homeowner has.

Homeowners don’t know what codes are unless they’re in the business of plumbing, electricity, or whatever, where they live by this day-by-day to make sure the installation is safe. The homeowners don’t.

The majority of homeowners have very little, especially – and not to be sexist – but especially women don't have a mechanical background to understand the ramifications of installing things in a certain procedure for safety's sake. They hire people to do this so that the device or work that is done in a proper workmanship-type way, and also so that it's mechanically safe and physically safe so that there's not going to be gas leaks, electrical arcs that could cause problems with devices or fires in the future. That's why they hire these people for.

Deposition of David Stayer, at 45-46.<sup>5</sup>

One of the theories that plaintiff has alleged herein is that Pritchard and Dameron, instead of installing the dryer, should have warned Mrs. Hill of the dangers associated with an unplugged gas line. A duty to warn Mrs. Hill of this danger is comparable to the duty that was described by this Court in *Glittenberg*:

A duty is imposed on a manufacturer or seller to warn under negligence principles summarized in § 388 of 2 Restatement Torts, 2d, pp. 300-301. Basically, the manufacturer or seller must (a) have actual or constructive knowledge of the claimed danger, (b) have "no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition," and (c) "fail to exercise reasonable care to inform [users] of its dangerous condition or of the facts which make it likely to be dangerous."

441 Mich at 389-390.

As noted by this Court in *Glittenberg*, the obligation that rests with the manufacturer or seller of a consumer product to warn of a danger is a product of the fact that the consumer will lack the knowledge to realize that danger.

The facts of this case fit squarely within the duty test set out in *Glittenberg*. Here, Pritchard

---

<sup>5</sup>Mr. Stayer is not the only witness in this case who focused on the defendants' superior knowledge. Another of plaintiffs' experts, Joseph Gannon commented that Pritchard and Dameron had an obligation to be aware of the danger being created because, "[t]hat's what they do for a living . . . [a] delivery person should be so versed in their job that they see the obvious and do something or make somebody aware of it." Deposition of Joseph Gannon, at 51-52.

and Dameron either knew<sup>6</sup> or should have known of the danger associated with the uncapped gas line at the time they installed the dryer. Moreover, Mrs. Hill testified in her deposition that she did not even know if there were gas lines in her kitchen. She “assumed that Sears did all that . . . I thought Sears did the stuff when they came out.” M. Hill Dep., p. 18.

**B. Foreseeability.**

The second factor identified in *In Re Certified Question* relevant to the recognition of a duty is foreseeability. As this Court ruled in *Moning*, the appropriate determination of foreseeability depends on “whether it is foreseeable that the [defendant’s] conduct *may create a risk of harm* to the victim . . .” 400 Mich at 439 (emphasis added); *see also James v Alberts*, 464 Mich 12, 15; 626 NW2d 158 (2001); *McMillan v State Highway Commission*, 426 Mich 46, 61-62; 393 NW2d 332 (1986). What is important, therefore, is whether it is foreseeable that a defendant’s conduct creates *a risk of harm* to the plaintiff. Thus, as the Court has noted, in assessing the foreseeability of injury, “[a] plaintiff need not establish that the mechanism of injury was foreseeable or anticipated in specific detail. *It is only necessary that the evidence establishes that some injury to the plaintiff was foreseeable or to be anticipated.*” *Schultz v Consumers Power Co.*, 443 Mich at 452-453, n. 7 (emphasis added); *see also Comstock v General Motors Corp.*, 358 Mich 163, 180; 99 NW2d 627 (1999) (“The law does not require precision in foreseeing the exact hazard or consequence which happens. It is sufficient if what occurred was one of the kind of consequences which might reasonably be foreseen.”); *Allen v Owens-Corning Fiberglass Corp.*, 225 Mich App 397, 408; 571

---

<sup>6</sup>In their applications for leave, the defendants have repeatedly noted that the record contains no evidence that Pritchard and Dameron had *actual* knowledge of the uncapped gas line. This subjective knowledge is not the sole test of negligence. Negligence is associated with both defendants’ *actual* knowledge and their *constructive* knowledge, *i.e.* what they knew or should have known.

NW2d 530 (1997).

The record in this case contained a substantial body of evidence demonstrating that it was foreseeable that the defendants' negligent conduct created a risk of harm to plaintiffs. Indeed, a single document submitted to the circuit court in response to the defendants' summary disposition motion was, in and of itself, sufficient to establish the foreseeability of such danger.

That document consisted of selected provisions from the National Fuel Gas Code. A copy of these Code provisions is attached as Exhibit B. That Code addresses the installation/disconnection of gas products.<sup>7</sup> It specifically provides that gas lines that have been disconnected *must* be capped. More importantly for present purposes, that Code specifies *why* such gas lines must be capped:

Each outlet, including a valve or cock outlet, shall be securely closed gastight with a threaded plug or cap immediately after installation and shall be left closed until the gas utilization equipment is connected thereto. Likewise, when the equipment is disconnected from an outlet and the outlet is not to be used again immediately, it shall be securely closed gastight.

Outlets shall not be closed with tin caps, wooden plugs, corks, or by other improvides methods.

\* \* \*

---

<sup>7</sup>Because the Fuel Gas Code addressed the installation and/or disconnection of gas appliances, defendants have argued throughout this case that this Code is of no relevance here since Pritchard and Dameron were not installing or removing a gas appliance. The defendants' argument that the Fuel Gas Code does not apply to this case may have some relevance to an issue that remains to be addressed in this case, whether the plaintiff may use this Code to establish the defendants' breach of the standard of care, *i.e.* their negligence. But, this argument with respect to use of the Code to establish defendants' negligence has absolutely nothing to do with the Code's importance in establishing the foreseeability element of a duty. Regardless of whether the defendants violated the Fuel Gas Code, that Code unequivocally demonstrates that the mechanism of this particular accident - the accidental opening of a gas valve - is entirely foreseeable. The Code's description of the dangers associated with a gas line left uncapped is directly relevant to (and completely dispositive of) the question of the foreseeability of harm.

*The basic concept here is that a plug or cap closure is required for all gas openings. Closing a valve is not enough to satisfy this requirement because **the valve may be opened accidentally or by an unknowing person.** No temporary or makeshift closure is permitted because anything except a cap or proper plug could leak.*

National Fuel Gas Code (Exhibit B), §3.8.2  
(emphasis added).

Thus, the National Fuel Gas Code indicates that the whole purpose for requiring that disconnected gas lines be capped is to prevent the very scenario that led to the plaintiffs' injuries - the accidental opening of a gas line. The reason, of course, that this precaution is mandated is because a cause of the explosion in this case - Mrs. Hill's inadvertent opening of the gas line - is entirely foreseeable.

However, the National Fuel Gas Code represented only a part of the evidence in this case bearing on the foreseeability question. For example, James Asaro, a former employee of Exel who worked in a Sears warehouse managing deliveries, testified that delivery drivers either were provided training or should have received training on what to do when faced with the situation of installing an electric dryer in a space where the gas dryer had already been removed and an uncapped gas line remained. Mr. Asaro stated that the installers were trained to make sure that the valve for the line was turned off and then secured by putting a cap or bolt in it. Deposition of James Ansaro at 11-13, 17, 27. The reason installers were trained in this way was precisely because of the foreseeability of the type of accident that occurred here. *Id.* at 13. As Mr. Asaro explained, putting a new electric dryer into a space where there is an existing uncapped gas line, is a "potential accident waiting to happen." *Id.* at 29. He added:

Because it's a safety issue with it being there, and in this particular case, if it was uncapped. . . that's definitely a safety issue. . . This particular case in installing an electric dryer and if there's a gas line there, that's common knowledge to these

people in the industry making a delivery to a home.

*Id.*, at 31-32.

Ryan Tolitsky, an Exel employee who was in charge of deliveries for Sears, disagreed with Mr. Asaro's testimony that installers were trained to cap an existing uncapped gas line from a previous gas dryer before installing an electric dryer. Deposition of Ryan Tolitsky at 14. However, Mr. Tolitsky stated that "professionally" he believed that an uncapped gas line is potentially dangerous because it is foreseeable that it could be accidentally opened and an explosion could occur. *Id.*, at 15-16. He also testified that it was his "personal belief" that, for safety reasons, when installing an electric dryer in a space where there is an unused gas line, the gas line should be capped. *Id.*, at 23-24. When asked whether a person could make a mistake and accidentally open an uncapped gas line, Mr. Tolitsky responded "[a]bsolutely, anybody could." *Id.* at 11.

Another witness who testified on the foreseeability issue was David Stayer, one of plaintiffs' experts. In response to a question concerning whether a gas valve might inadvertently be left open, Mr. Stayer responded, [t]here's a very real probability that that could happen." Stayer Dep., at 44. He further indicated that it is necessary to cap the line "just . . . because that valve can inadvertently be opened." *Id.*

Another witness who provided sworn testimony concerning foreseeability was plaintiffs' safety expert, Dr. Ralph Barnett. In an affidavit that was submitted in response to defendants' summary disposition motion, Dr. Barnett indicated:

13. This house explosion and fire, and the resultant serious injuries, were *reasonably foreseeable* to Sears, Exel and its subcontractors. The documents of the Defendants, and those in the appliance community, themselves warn of the ultra hazardous nature of an electric dryer in the vicinity of flammable vapors. Further, the National Fuel Gas Code expressly indicates that a reason it mandates the capping of gas lines is

because humans may inadvertently open the hand levers on gas line thereby allowing for the leakage of naturel gas (when this is done through inadvertence, the gas will *not* be allowed to escape through the gas line *if* it is plugged). Here, because Sears and Exel, through its contractors, failed to ap the gas line when they installed the dryer, they created an increased hazard.

Barnett Affidavit (Exhibit A), ¶13 (emphasis in original).

The foreseeability of the May 21, 2007 explosion is not open to question. The precautions that are at the core of the plaintiffs' negligence claim against Pritchard and Dameron should have been taken to prevent precisely what occurred in this case, the inadvertent opening of a gas valve, allowing gas to leak into the Hills' home.

**C. The Burden On The Defendant.**

A third factor identified in *In Re Certified Question* is the burden that would be imposed on the defendant if a court were to recognize such a duty. Once again, this factor weighs heavily in favor of the plaintiffs. Plaintiffs have claimed in this case that, before installing the dryer in the Hills' kitchen, the defendants either should have capped the open gas line or alerted the plaintiffs to the existence of this uncapped line and of the considerable danger associated with that uncapped line. Neither of these theories demand much from the defendants; neither of these theories would impose even a minimal burden on the defendants.

To the extent that plaintiffs' theories of negligence might require defendants to cap the line, the evidence presented in the circuit court established that such a cap would cost less than \$.50. Tolitsky Dep, at 22. The burden that would be imposed on the defendants under plaintiffs' alternative theory is even less. Plaintiffs claim that the individual defendants should not have installed the dryer at all until the danger presented by the uncapped line was addressed. To avoid negligence under this alternative theory, all that Pritchard and Dameron would have had to do is

Speak to the Hills, advise them of the uncapped line and instruct them that they should take steps to cap it before the dryer was installed.

A finding that a common law duty of due care exists in this case would, in effect, impose no burden whatsoever on the defendants. Defendants, however, attempt to inflate the scope of the obligation that would be imposed on them if a duty were recognized. They suggest that recognition of a legal duty in this context would require appliance installers such as Pritchard and Dameron to conduct an investigation of a variety of potential hazards every time they deliver an appliance to a residence.

That is not what this case is about. Here, the only duty that plaintiffs seek to impose concerns a dangerous condition existing in the space where the individual defendants placed the dryer. Plaintiffs make no claim that defendants were duty-bound to conduct an investigation of plaintiffs' entire kitchen or entire home to locate potential dangers.

More importantly, the duty that would be imposed in this case is directly related to the defendants' area of expertise. This case would not impose on defendants a wide-ranging obligation to uncover *any* potential dangers in plaintiffs' home; rather it would simply impose on defendants, who routinely deal with gas dryers, a duty to apply their specialized knowledge to the dangerous condition that Pritchard and Dameron confronted but ignored. The level of expertise that defendants should have brought to bear in this limited circumstance was described in the affidavit of plaintiffs' expert, Dr. Barnett:

Sears and Exel would on occasions, remove from a home an existing gas dryer. These situations may include where, for instance: Sears had sold a new electric dryer, and would remove from the home an existing gas dryer at the time the new electric dryer was delivered, leveled and installed; or, a situation where a new gas dryer was delivered, and there was a problem with it so it was not installed and was instead

removed and returned by Sears to its warehouse. These situations are expressly covered by the National Fuel Gas Code, as being ones in which there is a mandate that the gas line be capped airtight. So, Sears and Exel knew, or should have known a gas line not in use needed to be capped or plugged.

Barnett Affidavit (Exhibit A), ¶12.

Contrary to the defendants' arguments, the scope of the duty implicated in this case is extremely limited. This duty encompasses the limited obligations that installer professionals would have when faced with a serious danger that is or should be directly tied to their experience and knowledge.

**D. Nature Of The Risk Presented.**

Finally, *In Re Certified Question* requires consideration of the potential risk presented to the plaintiff by the defendants' alleged negligence. Numerous reported Michigan cases have confirmed the seriousness of the risk presented by leaking gas. In *Fleeger*, this Court ruled:

A gas company, *since it is dealing with a highly dangerous substance*, is bound to use a degree of care commensurate with the danger of its gas escaping and causing injury or damage to the person or property of others.

262 Mich at 544 (emphasis added).

This Court further observed in *Gadde* that "gas has long been regarded as a dangerous substance. Anyone dealing with this commodity, because of its dangerous propensities must exercise . . . care for the safety of others . . ." 377 Mich at 126; *cf Girvan*, 238 Mich App at 713-715 (recognizing that "gas is a dangerous commodity" and noting that "the dangerous condition was created by the failure to cap the gas line. . .").

There can be no dispute that the risk presented by a hazardous substance such as gas leaking into a home is enormous. The facts of this case and the facts of the prior gas-related explosions that

have reached Michigan appellate courts confirm the extreme danger presented by leaking gas.

#### **E. Conclusion.**

This Court has held on numerous occasions that the common law imposes a duty of due care on the performance of any undertaking. *Loweke*, 489 Mich at 170; *Clark*, 379 Mich at 261. Thus, in undertaking the responsibility of delivery and installing the Hills' dryer, Pritchard and Dameron had a common law duty to perform that service in a nonnegligent fashion. Moreover, even in the absence of this traditional common-law duty, defendants would owe a duty to plaintiffs when the four-part test adopted in *In Re Certified Question* is applied. This is not a situation in which the Court need balance the relevant factors in determining whether to recognize a common law duty. The simple fact is that all four of the considerations set out in *In Re Certified Questions* support the conclusion that defendants owed a duty of due care to the plaintiffs.

#### **II. THE CREATION OF A NEW DANGEROUS CONDITION.**

The second question that the Court has requested the parties to address is whether Pritchard and Dameron "created a new dangerous condition with respect to the uncapped gas line, or made an existing dangerous condition more hazardous." 490 Mich at 896. This question would appear to be a reference to a discussion contained in the *Fultz* opinion. *Fultz*, as noted previously, ruled that a duty in tort must be "separate and distinct" from obligations that a defendant may have under a contract. 470 Mich at 467. For reasons discussed in the prior section of this brief, Pritchard and Dameron owed a common-law duty to plaintiffs that was separate and distinct from any contractual obligations they may have had.

The *Fultz* Court, while concluding that the defendant therein had no duty that was separate and distinct from its contract, identified one class of cases in which a contracting party would owe

a duty “separate and distinct” from that contract. The Court in *Fultz* recognized that a duty would exist if the defendant’s conduct created a new hazard. 470 Mich at 468-469. It is important to note that under the analysis employed in *Fultz* with respect to a “new dangerous condition” represents only one way in which a party can establish a duty “separate and distinct” from contract. Thus, the “new dangerous condition” discussion in *Fultz* does nothing to undermine the general common law duty that is the subject of the first section of this brief.

This fundamental point was reaffirmed in the *Fultz* decision itself. There, the Court held that “if one voluntarily undertakes to perform an act, having no prior obligation to do so, a duty may arise to perform the act in a nonnegligent manner.” *Id.* at 465. In this respect, the *Fultz* decision is completely consistent with *Loweke*’s later holding that “a separate and distinct duty to support a cause of action in tort can arise by . . . the generally recognized common-law duty to use due care in undertakings.” 489 Mich at 170; *see also Tucker v Pipitone*, 489 Mich 984; 799 NW2d 557 (2011); *Riddle*, 440 Mich at 95; *Nash v Sears Roebuck & Co*, 383 Mich 136, 142-143; 174 NW2d 818 (1970); *Clark*, 379 Mich at 260-261; *Hart v Ludwig*, 347 Mich 559, 565; 79 NW2d 895 (1956).

In this case, Pritchard and Dameron undertook the obligation to deliver and install the dryer in Mrs. Hill’s home. This case concerns their negligence in the course of that undertaking. As these cases have firmly established, the common law imposed a duty on these two defendants to complete this undertaking in a non-negligent manner. The law applicable to a defendants’ negligence associated with an undertaking is both well established and long established. Over 120 years ago, this Court held:

It is often said in the books, that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. But, *if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use*

*reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts.*

*Ellis v McNaughton*, 76 Mich 237, 241; 42 NW1113 (1989) (emphasis added).

Thus, for purposes of the essential duty question presented in this case, it is completely irrelevant whether Pritchard's and Dameron's negligence created a "new hazard." Having said this, plaintiff would note that the evidence presented in conjunction with the defendants' summary disposition motions confirms that defendants' actions did, in fact, increase the danger presented to plaintiffs.

This Court has held that "there is a clearly recognized legal duty *of every person* to avoid any affirmative acts which may make a situation worse." *Farwell v Keaton*, 396 Mich 281, 287; 240 NW2d 217 (1976) (emphasis added); *see also, Dumka v Quaderer*, 151 Mich App 68, 75; 390 NW2d 200 (1986). Assuming that *Farwell* applies to this fact situation,<sup>8</sup> Pritchard and Dameron, had an additional duty not to make the dangerous situation of the uncapped gas line in the plaintiffs' home worse through their conduct.

There is evidence from which a jury could find that Pritchard and Dameron knew or should have known of the uncapped gas line and the risk it presented. A jury could further conclude that

---

<sup>8</sup>The rule of law expressed in *Farwell* is generally applied to those situations in which the plaintiff is in some form of distress or danger. It is in this context that the law has been slow to impose an affirmative duty to rescue and/or protect the plaintiff. *See e.g. Williams v Cunningham Drug Stores, Inc.*, 429 Mich 495, 498; 418 NW2d 381 (1988). However, as *Keaton* demonstrates, if the defendant engages in some conduct that makes plaintiff's position worse, a duty to rescue/protect will be imposed. In this case, however, there is no claim that Pritchard or Dameron were negligent in failing to rescue plaintiffs or for failing to take action to protect them. Thus, the defendants' extended discussion of the purported "duty to protect" plaintiffs is completely inappropriate here. This is, as noted above, a case in which these two defendants engaged in an undertaking and they were responsible for all negligence committed in the course of that undertaking.

the risk of danger was increased by Pritchard and Dameron's conduct in concealing the hazard behind the dryer. Plaintiffs' safety expert, Dr. Barnett, testified that, when confronted with the uncapped gas line in the place where the dryer was to be installed, Pritchard and Dameron should have advised plaintiffs that they could not do so until the uncapped line was addressed. Deposition of Ralph Barnett, at 43-44. Dr. Barnett further indicted that defendants' decision to put the dryer in place increased the hazard to plaintiffs in two respects. Barnett Affidavit (Exhibit A), ¶9(c). First, the placement of the dryer in front of the uncapped gas line concealed this dangerous condition. *Id.* This aspect of Dr. Barnett's testimony was repeated in the deposition testimony of James Asaro, a former employee of Exel Direct:

Q. And for safety purposes you don't want to put a new electric dryer in a location where there is an unplugged existing gas line behind it, correct?

A. Correct.

Q. Because you could, in fact, conceal that, basically, correct?

A. Correct.

Asaro Dep., at 30.

The second way in which defendants' placement of the dryer made plaintiffs' situation worse was tied to a warning actually contained in Sears' instruction manual provided to purchasers of the dryer. These instructions included a clear warning to "[k]eep flammable materials and vapors, such as gasoline away from dryer." According to Dr. Barnett's deposition:

I am of the opinion Sears and Exel recognized, or should have recognized, the open gas line, and were aware of or should have been aware of the ultrahazardous activity of installing an electric dryer in an area of an open, uncapped gas line. This opinion is supported, in part, by the fact that both the Sears Electric Dryer User Instructions, as well as the Whirlpool Electric Dryer Installation Instructions contain express and prominent warnings and admonitions of installing or using the electric dryer in the

vicinity of flammable vapors (such as natural gas).

Barnett Affidavit (Exhibit A), ¶8.

For reasons addressed in Issue I, *supra*, Prichard and Dameron owed a duty of due care to plaintiffs regardless of whether their negligence increased the danger presented to plaintiffs. But, to the extent that a duty can be imposed on defendants for conduct that increased the danger to plaintiffs, a cognizable duty must be recognized on that basis as well.

### **III. THE DUTY OF SEARS AND EXEL.**

The third issue that the Court has requested the parties to address is whether the corporate defendants named in this case owed a duty to plaintiff. Obviously, to the extent that Pritchard and Dameron were acting as agents of Sears and/or Exel, the duties that these two individuals owed to the plaintiffs apply to the corporate defendants as well. *Cf Al-Shimmari v Detroit Medical Center*, 477 Mich 280, 294; 731 NW2d 29 (2007); *Smith v Webster*, 23 Mich 298, 300 (1871). The question posed by the Court would appear to involve consideration of Sears' and Exel's arguments that they cannot be held vicariously liable for any negligence committed by Pritchard and Dameron. The Court of Appeals ruled that issues of fact remained on the question of the vicarious liability of both Sears and Exel. The Court of Appeals did not err in reaching this result.

#### **A. Actual Agency.**

Michigan courts have recognized that the determination of whether an individual is the actual agent of another must be made on a case-by-case basis. Thus, in distinguishing between an agent and an independent contractor, this Court wrote in *Sliter v Cobb*, 388 Mich 202; 200 NW2d 67 (1972), “[i]t is clear that in this area the result must be based on the facts of each case, and all of the cases cited, while properly stating the general rule, are not dispositive in this situation.” *Id.* at 207.

*See also Marchand v Russell*, 257 Mich 96, 103; 241 NW 209 (1932); *Caramagno v Tuchel*, 173 Mich 167, 170; 433 NW2d 389 (1988). Because the distinction between an agent or servant and an independent contractor depends on the assessment of multiple factors particular to each case, Michigan courts have held that “the existence of a principal-agent relationship is generally for the jury to decide.” *Lincoln v Fairfield-Nobel Co*, 76 Mich App 514, 519; 257 NW2d 148 (1977); *DeNike v Otsego County*, 45 Mich App 711, 714; 206 NW2d 786 (1973) (“employment status generally raises a disputed question of fact and is not properly disposed of by summary judgment . . . .”); *Hertz Corp v Volvo Truck Corporation*, 210 Mich App 243, 246; 533 NW2d 15 (1995) (“any question relating to the existence and scope of an agency relationship is a question of fact.”).

This Court has expressed the role of the jury in determining agency questions even more forcefully. In *St. Clair Intermediate School District v IEA/MEA*, 458 Mich 540; 581 NW2d 707 (1988), this Court held that, “where there is a disputed question of agency, *if there is any testimony, either direct or inferential, tending to establish it, it becomes an issue of fact.*” *Id* at 586 (emphasis added); *Vargo v Sauer*, 457 Mich 49, 71; 576 NW2d 656 (1998); *see also Miskiewicz v Smolenski*, 249 Mich 63, 70; 227 NW 789 (1929); *Meretta v Reach*, 195 Mich App 695, 697; 491 NW2d 278 (1992). Thus, under established Michigan law, agency questions are particularly within the province of a jury and, where there is *any* direct or circumstantial evidence supporting the existence of an agency relationship, a court is required to submit this question to the trier of fact.

It is equally well established in Michigan law that the operative test for determining whether Pritchard and Dameron were actual agents of Sears or Exel focuses on the question of control. An agency relationship arises where the principal “has the right to control the conduct of the agent with respect to the matters entrusted to him.” *St Clair Intermediate*, 458 Mich at 558, n. 18; *Persinger*

*v Holst*, 248 Mich App 499, 504-505; 639 NW2d 594 (2001) (“an essential component of the relationship is the principal’s right to control, at least at some point, the conduct and actions of his agent.”). By contrast, an independent contractor is one who “contracts to do a piece of work according to his own methods and without being subject to control of his employer as to the means by which the result is to be accomplished.” *Utley v Taylor & Gaskin, Inc.*, 305 Mich 561, 570; 9 NW2d 842 (1943); *Campbell v Kovich*, 273 Mich App 227, 234; 731 NW2d 112 (2007).

The existence of a principal/agency relationship, however, is not dependent on the level of control actually *exercised* by the principal. Rather, it is “the right to interfere that makes the difference between an independent contractor and a servant or agent”. *Van Pelt v Paull*, 6 Mich App 618, 624; 150 NW2d 185 (1967); *see also, Tuttle v Embury-Martin Lumber Co.*, 192 Mich 385, 399; 158 NW 875 (1916) (“the test of the relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between the independent contractor and a servant or agent.”). Thus, the agency issue involved herein is not to be assessed on the basis of the *actual* control that Sears or Exel may have exercised over the individual defendants, but on “the right to control, *whether in fact exercised or not.*” *Brinker v Koenig Kohl & Supply Company*, 312 Mich 534, 540; 20 NW2d 301 (1945) (emphasis added); *Lewis v Summers*, 295 Mich 20, 23; 294 NW 82 (1940); *Jenkins v Raleigh Trucking Services, Inc.*, 187 Mich App 424, 429; 468 NW2d 64 (1991).

This Court recognized in *St. Clair Intermediate School* that “[t]he characteristic of the agent is that he is a business representative. His function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between his principal and third persons.” 458 Mich at 557, *quoting Saums*, 270 Mich at 172. The evidence developed in this case demonstrates

that this is precisely the relationship that existed between Sears/Exel and the driver/installers in this case, Pritchard and Dameron.

One of the primary pieces of evidence that defendants point to in their attempt to establish that Pritchard and Dameron were acting as independent contractors is the Truckers' Agreement between Exel and Pritchard. That agreement states that these parties intend to create an "independent contractor relationship" and not an "employer-employee relationship". However, Michigan cases have recognized that "the manner in which the parties designate the relationship is not controlling" on the issue of agency. *Van Pelt v Paull*, 6 Mich App 618, 624; 150 NW2d 185 (1967); *see also Caldwell v Cleveland Cliffs Iron Co.*, 111 Mich App 721, 732; 315 NW2d 186 (1982)("the label the parties place on their relationship is not determinative"); *Lincoln v Fairfield-Nobel Co*, 76 Mich App at 520 ("if an act done by one person on behalf of another is in its essential nature one of agency, then he is an agent regardless of the title bestowed upon him."). The question of agency presented in this case, therefore, is not to be resolved on the basis of how the parties chose to label their relationship. Rather, "whether an agency has been created is to be determined by the relations of the parties as they in fact exist under their agreements or acts." *Saums v Parfet*, 270 Mich 165, 171; 258 NW 235 (1935).

An examination of the evidence in this case concerning the relationships between these parties demonstrates that Sears clearly had extensive control over the activities of Exel and, through them, control over the actions of Pritchard and Dameron. Although ¶9 of the Truckers' Agreement between Pritchard and Exel provides that Pritchard "will determine the means of performance, including but not limited to such matters as choice of any routes, points of service of equipment, rest stops, and timing and scheduling of customer deliveries", the reality of the situation was far

different.

Ryan Tolitsky, who was employed by Exel at the Sears Livonia warehouse as its Logistics Carrier Manager, provided extensive testimony on the relationships between the defendants. *R. Tolitsky Dep.*, at pp 3-4. He explained that prior to performing work on behalf of Sears, every driver/installer was required to go through an extensive background check through Sears and Exel. *Id.*, at pp 16-17. Although Mr. Tolitsky referred to Mr. Pritchard and other driver/installers as “independent contractors” he explained that each of these individuals was also required to go through Exel’s “Five Star” training program which establishes how they are to present themselves at a customer’s home, what the expectations are when they deliver to a customer’s residence, and provides a specific set of guidelines they must follow to assure that they are as professional and courteous as possible to customers. *Id.*, at 13. Once driver/installers progress through this program, they must still ride along with a “Master Contractor” for additional training before they actually begin performing installations. *Id.* Master Contractors are “veteran independent contractors” that Exel deems to have demonstrated excellent customer service and that it utilizes to train other driver/installers. These “veterans” go through a special “Master Contractors” training class run by Exel. *Id.*, at 12. Pritchard was a “Master Contractor” at the time of the installation at the Hills’ home. *Id.*, at 16.

While a “second driver” such as Dameron does not go through the Five Star program, his “independent contractor”(Pritchard) is required to train him in accordance with the guidelines. *Id.*, at 17-18. As a “qualified second driver,” Exel required that Dameron have the same qualifications and go through the same requirements as Pritchard. Deposition of Craig Bannon. at 30.

Mr. Tolitsky further testified that the contract between Sears and Exel contains at specific

details about what delivery persons and/or installers can and cannot do. Tolitsky Dep., at 32. An examination of that lengthy document demonstrates that this is indeed the case. It sets out precisely what Sears mandates that Exel require its "Delivery Teams" (the driver/installers such as Pritchard and Dameron) must do in the performance of services delivering and installing Sears appliances. Home Delivery Carrier Agreement, attached as Exhibit F to Application for Leave to Appeal filed by Pritchard and Dameron. These Sears-imposed requirements include: Delivery procedures specific to various appliances that Exel and its delivery teams must follow. Home Delivery Carrier Agreement, at p 35-39; specific details regarding what Delivery Teams must do when entering the customers premises, removal of doors to make deliveries, what to do when unhooking and removing old appliances *Id*, at pp 32-33; requirements regarding delivery team attendance at operations meetings each day and details of how the delivery team should have input at such meetings *id*, p 34; and details about vehicles to be used by Delivery Teams and what team members are to wear (*Id*). These are just a few examples that demonstrate Sears' exhaustive actual control and authority to control the actions of Exel and its so-called "independent contractors", such as Pritchard and Dameron.

Sears also provided the driver/installers with all of the tools and materials necessary for performing the appliance installations and the totes to carry them in. Only tools and parts provided by Sears were to be utilized by the installers. Tolitsky Dep, at pp 28-29; Deposition of Dwight Lindstrom, at p 29.

As Mr. Tolitsky testified, Sears had the right to direct Exel and its driver/installers with respect to what was to be done or not done when delivering Sears products:

Q. Just for example, say that there's some guy from Sears that is in the power to

make this call and he decides that if there is a gas line outlet that is unplugged in a home from a previous gas dryer that had been removed, in the spot where a new electric dryer is going to be installed, and that Sears guy made the decision that outlet needs to be capped under those circumstances, would Exel follow the Sears directive?

A. Yes.

Q. *Does Sears direct certain things that you can think of in terms of what the guys are supposed to do at the home or not do?*

A. *They do it all.*

\* \* \*

Q. When you say they do it all, what do you mean? Just go ahead and tell us, what do you mean when you say they do it all?

A. *Whatever the delivery guidelines says we will do, we will do. That's plain and simple answer. If it's in the delivery guidelines, we will do it. If it's not in delivery guidelines, we will not do it.*

Tolitsky Dep., at 30-31 (emphasis added).

Mr. Tolitsky also described the contract that existed between Sears and Exel as providing explicit directions that Exel and its driver/installers were to follow:

Q. What is that generally?

A. That is our contract with Sears and Exel. That's our standard contract.

Q. And that -

A. That every delivery company has.

Q. *And that has all kinds of really specific stuff about what these guys are to do or not do out on the road, true?*

A. *That is correct.*

Q. It's kind of like the Bible almost, true?

A. Depending on how you interpret the Bible, yes.

Q. That's a bad question. But again, going back to our other question, if somewhere in here in this contract Sears had insisted that be in there, that the outlets on the gas line be capped from a previous gas dryer when you go to install a new electric dryer, again, that would be something that you at Exel would make sure that the independent contractors did when they went to the job site, true?

A. Yes, sir. Absolutely.

*Id.*

This testimony indicates without equivocation that Sears reserved the right to dictate how driver/installers were to perform their roles. This control, as Mr. Tolitsky acknowledged, would extend to requiring the capping of a gas line under the circumstances that existed in this case. Once again, it must be stressed that an agency relationship is not predicated on the actual control *exercised* by the principal, but on the control that the principal *could* exercise, *i.e.* "the right to control, whether in fact exercised or not." *Brinker*, 312 Mich at 540.

Mr. Tolitsky's testimony clearly established that Sears could, if it chose to, control precisely what the purported "independent contractors," Pritchard and Dameron were to do in the delivery and installation process. Similarly, if Sears insisted on exercising that control, Exel would guarantee that Sears' requirements were imposed on the driver/installers. Thus, both Sears *and* Exel could exercise control over how Pritchard and Dameron performed their jobs.

Craig Bannon, the Exel District Manager, confirmed much of Mr. Tolitsky's testimony concerning the high level of control that Sears and Exel could exercise over the driver/installers' daily operations and activities, including fairly extensive training regarding natural gas. Bannon Dep, at pp 8-11. He reiterated that Exel and the driver/installers it hires must follow Sears guidelines

about what they can and cannot do. Mr. Bannon testified:

Q. Do you know if there's a Michigan code on that issue?

A. I do not. *We take our direction from Sears.*

Q. What do you mean you take your direction from Sears?

A. *As you can see the guidelines, what we can and cannot do.*

Q. So just hypothetically, if Sears had, in this delivery guideline or otherwise, instructed Exel people that when they remove a gas dryer and shut off that valve, they're also to plug or cap the end of that gas line, would the Exel people do that?

A. If it doesn't follow specific guidelines, *we look for direction from our corporate.* We have to do exactly - first of all, we're not going to do anything that's unethical or illegal or anything else. *So we would look to our corporate office for direction.*

Bannon Dep., at 27 (emphasis added).

This testimony by M. Bannon established that either Sears *or* Exel could exert control over the performance of installers such as Pritchard and Dameron. Mr. Bannon further testified:

A. Sears has Best Practices or the Five Star training, Five Star is Sears.

Q. What's Best Practices?

A. Best Practices would be *what's supposed to be done on a regular day-to-day basis.*

Q. That's a Sears training tool?

A. I would think probably *both Sears and Exel.*

Q. Is that in writing and video both?

A. No, that would not be in video, I believe.

\* \* \*

Q. And that deals with natural gas?

A. *It deals with everything that we are available to do, yeah.*

*Id.*, at 16.

If there is *any* direct or circumstantial evidence tending to establish an actual agency, the existence of a principal/agent relationship is an issue of fact to be resolved by the trier of fact. *St. Clair Intermediate Schools*, 458 Mich a 586. Here, taking the evidence presented in conjunction with defendants' motion for summary disposition in the light most favorable to plaintiffs, *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999), there were ample proofs to preclude summary disposition on the issue of actual agency as to both Sears and Exel.<sup>9</sup>

**B. Ostensible Agency.**

There is a second reason why Sears must be considered the principal of Pritchard and Dameron. The doctrine of "ostensible agency" or "agency by estoppel" is also applicable to establish vicarious liability on the part of Sears for the negligent actions of Pritchard and Dameron. An agency is ostensible "when the principal intentionally, or by want of ordinary care, causes a third

---

<sup>9</sup>With respect to Exel's status as a principal of Pritchard and Dameron, the Court should note the District of Columbia Court of Appeals decision in *Schechter v Merchants Home Delivery, Inc.*, 892 A2d 415 (DC App 2006). In that case, the plaintiff purchased a washing machine from Circuit City, which was to be delivered and installed in plaintiff's home. Merchants Home Delivery was the company that actually arranged for the delivery and installation of Circuit City appliances. The two men who delivered and installed the washer were alleged by the to have stolen jewelry and other valuables while they were in plaintiff's home. The plaintiff in *Schechter* claimed that the two men were acting as agents of both Circuit City and Merchant Home Delivery. Like the defendants here, Circuit City and Merchant contended that the two installers were actually independent contractors and had no legal relationship with either defendant. The District of Columbia appeals court in *Schechter* reversed a judgment entered in favor of defendants, holding that the issue of whether they were employees should have been submitted to the jury. *Schechter*, 892 A2d at 418, 427. The evidence regarding the relationship between Merchant and the delivery men in *Schechter* was remarkably similar to that in the present case.

person to believe another to be his agent who is not really employed by him.” *Howard v Park*, 37 Mich App 496, 500; 195 NW2d 39 (1972), quoting *Stanhope v Los Angeles College of Chiropractic*, 54 Cal App 2d 141, 146; 128 P2d 705, 708 (1942). Ostensible agency is established when a party demonstrates that “the principal held the agent out as being authorized, and a third person, relying thereon, acted in good faith upon such representations.” *Park*, 37 Mich App at 499, quoting 1 *Callaghan’s Michigan Civil Jurisprudence*, Agency, §27, 171-173. The principal will be estopped to deny the existence of an agency relationship if its actions and conduct “were such as to reasonably lead a third person to believe that an agency in fact existed.” *Id.*

Michigan has established a three part test to determine whether vicarious liability will be imposed based on an ostensible agency theory: (1) the person dealing with the agent must do so with reasonable belief in the agent’s authority; (2) that belief must be created by some act or neglect of the alleged principal; (3) the person relying on the agent’s apparent authority must not be guilty of negligence. *Little v Howard Johnson*, 183 Mich App 675, 683; 455 NW2d 390 (1990).

In the present case, it is clear that Sears fully intended that its customers, such as the Hills, believe that the driver/installers were Sears’ employees or agents. Mrs. Hill indicated her belief that, when purchasing her washer and dryer, she was making arrangements for a *Sears* employee to come to her home and install these appliances. M. Hill Dep., at 18-20, 74-76.) Dwight Lindstrom, Sears General Manager of Delivery for the Detroit/Toledo area, confirmed Mrs. Hill’s impression, testifying that Sears customers were specifically asked when purchasing their appliances: “Would you like *us* to hook up your dryer?” Lindstrom Dep., at 13. (emphasis added).

Those, like Pritchard and Dameron, who make deliveries and do the installation of Sears products, are required by Sears to wear hats and shirts identifying them as “Sears Authorized

Delivery”. Dep., at p 25; Lindstrom Dep, at 31. A Sears representative actually observes the delivery teams each morning to make sure that they are in full compliance with Sears uniform requirements. Lindstrom Dep., at 31. One of the reasons for this uniform requirement is that customers have purchased their appliances from Sears and they expect a “Sears guy” to come out and do the installation. Tolitsky Dep., at 25.

Moreover, the trucks used for the deliveries, which are owned by the driver/installers like Pritchard, must also bear the Sears logo. Lindstrom Dep., at 31; Bannon Dep., at 40. Even the Sears Dryer User Manual references “*Sears* guaranteed professional installation”. (Exhibit Q, p 8.) There can be little doubt that Sears is attempting to create the impression that the installers are its agents or even employees.

There was sufficient evidence in this record to support all three elements of a ostensible agency theory as against Sears. Mrs. Hill, who was told that Sears would deliver her appliances, had a reasonable belief that the men who brought the washer and dryer to her home were agents of Sears. Moreover, Mrs. Hill obviously was not responsible for any negligence. Finally, there can be no doubt that Sears took a number of affirmative steps to create the belief that its agents were responsible for delivery. Under this ostensible agency theory, even if an actual agency did not exist between Sears and the two individual defendants, Sears would still be vicariously liable for their negligence on an ostensible agency theory.

#### **IV. THE PROXIMATE CAUSE ISSUES RAISED IN DEFENDANTS’ APPLICATIONS FOR LEAVE TO APPEAL.**

While the Court’s October 26, 2011 directive did not include mention of any issue of proximate cause, the defendants have raised such an issue in their applications for leave to appeal.

Plaintiffs will, therefore, briefly address the proximate cause questions that have been raised.

The term proximate cause actually entails two separate elements: (1) cause in fact, and (2) legal cause, also known as 'proximate cause.' *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994). Defendants cannot and do not contend that their conduct was not the "cause in fact" of plaintiffs' injuries. They argue only that their conduct not a "legal" or "proximate cause" of those injuries. It is essentially their position that Mrs. Hill's accidental opening of the valve on the gas line, the Hills' alleged failure to respond appropriately to the smell of gas, and Patricia Hill's ignition of her lighter, were intervening, superseding acts of negligence that broke the chain of causation between their negligence and plaintiffs' injuries. Defendants' argument is based on a faulty understanding of proximate cause.

There is no question that plaintiffs can establish cause in fact. To demonstrate cause in fact, the plaintiff must present "evidence" from which a jury could conclude that but for the defendants' conduct, the plaintiffs' injuries would not have occurred. *Skinner*, 445 Mich at 164-165. Here, it is obvious that if Pritchard and Dameron either capped the gas line themselves or advised plaintiffs that this had to be done before installation of the dryer, plaintiffs' house would not have exploded. As plaintiffs' safety expert, Dr. Barnett, explained:

And then all the subsequent things that happened, she can turn on gas valves until she turns purple, she's not going to get gas leaking into the kitchen. It will already have been sealed up. She will not be grabbing the wrong handle because the right handle that deals with this will be hidden in back of the damn appliance where she can't even reach. It won't be tucked away around the corner in someplace where she's out of line of sight to the appliance that she's controlling.

(Exhibit R: R. Barnett Dep, pp 50-51)

Thus "but for" the defendants' failure to act in a reasonable manner when installing the electric

dryer, the incident that led to this litigation would not have occurred. *See, Skinner, supra.*

As to the issue of legal or proximate cause, the Supreme Court has recognized two distinct tests, depending on whether the case involves a direct causal situation or intervening causal circumstances. *McMillian v Vliet*, 422 Mich 570, 576-577; 374 NW2d 679 (1985). "An intervening cause situation involves an intervening cause or act which begins operating 'after the actor's negligent act or omission has been committed'." *Id* at 577, quoting 2 *Restatement Torts*, 2d, §441, p 465. Plaintiffs do not contest the defendants' analysis that this case involves an intervening cause situation. The accidental turning of the gas valve in the furnace room and the ignition of the lighter were definitely causative factors that began operating after the defendants' negligent installation of the dryer in front of the uncapped gas line.

However, merely because an intervening cause is involved, does not necessarily absolve the defendants of their negligence or sever the chain of causation. The intervening cause only constitutes a superseding cause that breaks the chain of causation *if the intervening act was not reasonably foreseeable*. *McMillian*, 422 Mich at 576; *Comstock v General Motors Corp*, 358 Mich 163, 178; 99 NW2d 627 (1959); *Davis v Thornton*, 384 Mich 138, 148; 180 NW2d 11 (1970).

A decision of this Court which deserves particular attention in this context is *Hickey v Zezulka*, 439 Mich 408; 487 NW2d 106 (1992). In that case, this Court expressly adopted the concept of intervening cause as reflected in 2 *Restatement Torts*, 2d, §449:

§449. Tortious or Criminal Acts the Probability of Which Makes Actor's Conduct Negligent

If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.

*Id.*, quoted at 439 Mich at 437.

This case fits squarely within §449 of the Restatement, adopted by this Court in *Hickey*. That section of the Restatement is specifically addressed to the determination of when an intervening force operates as a superseding cause which severs the causal link between an act of negligence and the plaintiff's injury.<sup>10</sup> That section of the Restatement specifies that a subsequent act of a third person cannot be deemed a superseding cause of an injury where the defendant's negligence is tied to the hazards that might be created by the third person.

In the present case, it was the very potential of an incident like the one that injured plaintiffs that rendered the defendants' conduct negligent. By leaving the gas line unplugged and then concealing that dangerous condition behind the dryer, it was foreseeable that the gas line could be accidentally opened, gas would leak from this uncapped line, and an explosion could occur. Asaro Dep, at 28, 29; Gagnon Dep, at 50, 56; Tolitsky Dep, at 15-16; Stayer Dep, at 44-46; Barnett Affidavit, ¶13, Barnett Dep, at 37. As noted previously, the National Fuel Gas Code recognizes the foreseeability of such an incident, expressly stating that leaving a line uncapped can lead to inadvertent leaks or an accidental opening of the line by the homeowner. See Exhibit B. The foreseeability of the intervening acts that occurred following the defendants' negligent installation

---

<sup>10</sup>2 Restatement Torts, 2d, §449, represents a specialized application of the rule set out in §442(c) of the Restatement. That provision states:

The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another:

\* \* \*

(c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;

of the dryer, leading to the explosion, is clear.

The fact that the precise manner by which such an inadvertent opening of the line and explosion might occur could not be anticipated is irrelevant. *Ross v Glaser*, 220 Mich App 183, 188; 559 NW2d 331 (1997), *Schultz*, 443 Mich at 453 fn 7. It is enough that the general risk of injury could be foreseen. *Id.*

The defendants' request for judgment in their favor on the basis of a purported superseding cause also overlooks the fact that the question of reasonable foreseeability is not for a court to decide where material facts remain in dispute. Where reasonable minds can differ, the question of whether an intervening act is foreseeable represents an issue that must be decided by the trier of fact. *Comstock*, 358 Mich at 179-181; *Richards v Pierce*, 162 Mich App 308, 317-318; 412 NW2d 725 (1987); *Scott v Allen Bradley Co.*, 139 Mich App 665, 672; 362 NW2d 734 (1985); *Young v EW Bliss Co.*, 130 Mich App 363, 369; 343 NW2d 553 (1983); *Taylor v Wyeth Laboratories*, 139 Mich App 389, 402; 362 NW2d 295 (1985). Here, reasonable minds can differ on the questions of whether an injury was foreseeable. Since there are material issues of fact bearing on the foreseeability question, defendants are not entitled to judgment in their favor on the ground that there was a superseding cause of plaintiff's injury.

Defendants also raise a question of remoteness. They claim that because approximately 3½ years elapsed between defendants' negligent actions and the explosion that caused plaintiffs' injuries, this lapse of time should somehow be deemed to negate proximate cause. However, negligent conduct need not be the immediate cause of injury to be deemed a proximate cause. As this Court held in *Parks v Starks*, 342 Mich 443, 447-448; 70 NW2d 805 (1995).

'The proximate cause of an injury is not necessarily the immediate cause; not

necessarily the cause nearest in time, distance, or space. Assuming that there is a direct, natural, and continuous sequence between an act and an injury, \* \* \* the act can be accepted as the proximate cause of the injury without reference to its separation from the injury in point of time or distance.'

*Id* at 448, quoting 38 *Am Jur, Negligence*, §55

In the present case, there was a continuous connection between the defendants' negligent acts and omissions in installing the electric dryer and the injury that resulted. The very risk that made their conduct negligent in the first place-- that the uncapped gas line could be inadvertently opened and gas vapors ignited -- continued to operate throughout the intervening period of time. The defendants' prior acts of negligence were still operating to create conditions that could foreseeably lead to explosion and injury. *Parks*, 342 Mich at 447.

This Court has held that a tortfeasor "is liable for all injuries resulting directly from his wrongful act, whether foreseeable or not, provided the damages are the legal and natural consequences of the wrongful act." *Sutter v Biggs*, 377 Mich 80, 86; 139 NW2d 684 (1966). Here, despite the gap in time between the defendants' negligence and plaintiffs' injuries, the fact is that those injuries were a natural consequence of defendants' negligence associated with the uncapped gas line.

There is nothing unusual in the law of tort about a defendant being held responsible for acts of negligence occurring long before plaintiff was injured. A manufacturer of lawnmowers who designs a defective machine can be held liable in tort for an injury that occurs years later. Such a manufacturer would have no defense in this circumstance merely because the plaintiff's injury occurred years after its product was negligently designed.

This aspect of the defendant's remoteness argument is explained in Prosser and Keeton on

Torts (5<sup>th</sup> ed):

Remoteness in time or space may give rise to the likelihood that other intervening causes have taken over the responsibility. But when causation is found, and other factors are eliminated, it is not easy to discover any merit whatever in the contention that such physical remoteness should of itself bar recovery. The defendant who sets a bomb which explodes ten years later, or mails a box of poisoned chocolates from California to Delaware, has caused the result, and should obviously bear the consequences.

*Id.*, §43, p. 283.<sup>11</sup>

Consistent with these observations, this Court has rejected the argument that “mere lapse of time between defendant’s negligence and plaintiff’s resultant injuries will serve to transform that which otherwise would be a proximate cause into a remote cause excusing defendant from liability.” *Parks*, 342 Mich at 447-448; *see also McClaine v Alger*, 150 Mich App 306, 313; 388 NW2d 349 (1986); *Hall v State of Michigan*, 109 Mich App 592, 604; 311 NW2d 813 (1981); *Michigan Sugar Co v Employers Mutual Liability Ins Co of Wisconsin*, 107 Mich App 9, 15; 308 NW2d 684 (1981).

This Court has further held that “[t]he determination of remoteness . . . should seldom, if ever, be summarily determined.” *Davis*, 384 Mich at 147-148; *Comstock*, 358 Mich at 180. Here,

---

<sup>11</sup>This expression of remote causes is also reflected in comment f to 2 Restatement Torts, 2d, §433:

Experience has shown that where a great length of time has elapsed between the actor's negligence and harm to another, a great number of contributing factors may have operated, many of which may be difficult or impossible of actual proof. Where the time has been long, the effect of the actor's conduct may thus become so attenuated as to be insignificant and unsubstantial as compared to the aggregate of the other factors which have contributed. However, *where it is evident that the influence of the actor's negligence is still a substantial factor, mere lapse of time, no matter how long, is not sufficient to prevent it from being the legal cause of the other's harm.*

*Id.* (emphasis added)

a trier of fact could properly determine that defendants' negligence represented a proximate cause of plaintiffs' injuries. For all of these reasons, the defendants' various proximate cause arguments must be rejected.

**RELIEF REQUESTED**

For all of the foregoing reasons, Plaintiffs-Appellees, Marcy Hill, Individually and as Next Friend for Christopher Hill, a minor, and Patricia Hill, respectfully request that this Court deny defendants' applications for leave to appeal in their entirety. In the alternative, plaintiffs would request that the Court affirm the Court of Appeals May 24, 2011 opinion.

**MARK GRANZOTTO, P.C.**

  
**MARK GRANZOTTO (P31492)**

Attorney for Plaintiffs-Appellees  
225 South Troy Street, Suite 120  
Royal Oak, Michigan 48067  
(248) 546-4649

**FRASER & SOUWEIDANE, PC**

  
**STUART A. FRASER (P29055)**

Attorney for Plaintiffs-Appellees  
10 S. Main Street, Suite 302  
Mount Clemens, MI 48046  
(586) 463-0100

Dated: April 10, 2012

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

MARCY HILL, Individually and  
as Next Friend of CHRISTOPHER  
HILL, a minor, and PATRICIA HILL,

Plaintiffs,

-VS-

No. 07- 3755-NO  
HON. MATTHEW SWITALSKI

SEARS, ROEBUCK AND CO.,  
a foreign corporation, and CHARLES  
R. LINDSEY and ORALIA J. LINDSEY,  
EXCEL DIRECT, INC., a foreign corporation  
and MERCHANT DELIVERY, INC., a  
foreign corporation; SEARS LOGISTICS  
SERVICES, INC., a Delaware corporation,

Defendants.

STUART A. FRASER 29055  
EDWARD E. SOUWEIDANE P48931  
FRASER & SOUWEIDANE, P.C.  
Attorneys for Plaintiff  
10 S. Main, Suite 302  
P.O. Box 2304  
Mt. Clemens, MI 48046-2304  
(586) 463-0100; FAX: (586) 463-2506  
[stufraser@fsattorneys.com](mailto:stufraser@fsattorneys.com)

JERRY A. LASCOE P56482  
MOFFET, VITU, LASCOE & PACKUS  
Attorney for Defendant SEARS & SEARS  
LOGISTICS  
255 East Brown Street, Suite 340  
Birmingham, MI 48009  
(248) 646-5100; FAX: (248) 646-5332  
[jlascoe@mdaal.com](mailto:jlascoe@mdaal.com)

WAYNE A. GEIK P28781  
CONSTANTINE N. KALLAS P28532  
KALLAS & HENK, P.C.  
Attorneys for EXCEL DIRECT  
43902 Woodward Ave., Suite 200  
Bloomfield Hills, MI 48302  
(248) 335-5450, x206;  
FAX: (248) 335-9889

CHARLES R. LINDSEY in Pro Per  
ORALIA J. LINDSEY in Pro Per  
Defendants

7293 Westminster Circle  
Grand Blanc, MI 48439  
(586) 610-4162

AFFIDAVIT OF RALPH L. BARNETT

A

STATE OF ILLINOIS )  
 )ss.:  
COUNTY OF COOK )

)SS.:

COUNTY OF COOK )

RALPH L. BARNETT, being first duly sworn, deposes and says:

1. My Curriculum Vitae is attached hereto as Exhibit 1.
2. I have reviewed many depositions, and various file materials relative to the above captioned matter, and I have given a deposition setting forth many of my opinions. A copy of my deposition transcript is attached in its entirety as Exhibit 2 hereto.
3. I am very experienced and familiar with the hazardous nature of natural gas, and other gases, as I have researched the issue, and developed and performed testing procedures relative to natural gas.
4. I am also very experienced and familiar with pipes and valves, including those used in conjunction with natural gas. I have researched, developed and performed testing procedures relative to gas pipes and valves.
5. I am an expert in safety analysis, and foreseeability of harm, having consulted, researched, lectured, and written on the topic for decades.
6. I have reviewed the Sears (Kenmore) User's Guide for Electric Dryers, and have reviewed the Whirlpool Installation Instructions for Electric Dryers. These two documents are attached with this Affidavit as Exhibits 3 and 4, respectively.

2. I have reviewed many depositions, and various file materials relative to the above captioned matter, and I have given a deposition setting forth many of my opinions. A copy of my deposition transcript is attached in its entirety as Exhibit 2 hereto.

3. I am very experienced and familiar with the hazardous nature of natural gas, and other gases, as I have researched the issue, and developed and performed testing procedures relative to natural gas.

4. I am also very experienced and familiar with pipes and valves, including those used in conjunction with natural gas. I have researched, developed and performed testing procedures relative to gas pipes and valves.

5. I am an expert in safety analysis, and foreseeability of harm, having consulted, researched, lectured, and written on the topic for decades.

6. I have reviewed the Sears (Kenmore) User's Guide for Electric Dryers, and have reviewed the Whirlpool Installation Instructions for Electric Dryers. These two documents are attached with this Affidavit as Exhibits 3 and 4, respectively.

7. I am of the opinion Sears and Excel, by and through their contractors, did sell, deliver and install an electric dryer in the home of Marcy Hill in 2003. Susan Hill, the mother of Marcy Hill, testified she was home when the Sears/Excel contractors came into the home, and when they left she heard and saw the new Sears dryer in operation. At that time, there was an open, uncapped gas line in plain view, directly behind where the new electric dryer was being delivered, leveled and installed.

8. I am of the opinion Sears and Excel recognized, or should have recognized, the open gas line, and were aware of or should have been aware of the ultrahazardous activity of installing an electric dryer in an area of an open, uncapped gas line. This opinion is supported, in part, by the fact that both the Sears Electric Dryer User Instructions, as well as the Whirlpool Electric Dryer Installation Instructions contain express and prominent warnings and admonitions of installing or using the electric dryer in the vicinity of flammable vapors (such as natural gas).

9. I am of the opinion that Sears and Excel, by and through its contractors, were negligent, breached contractual duties of workmanlike service, and violated the standard of care in numerous respects, through misfeasance and nonfeasance, and failed to act, including but not limited to the following:

a. when they decided to proceed with the installation of the electric dryer with the uncapped gas line in the area, they should have placed a cap or plug on the end of the gas line prior to completing the job of delivering, leveling and installing the electric dryer; however, they failed to do so.

b. In the alternative, they should have refrained from installing the electric dryer, and should have clearly, unambiguously, and in writing, notified both the homeowner and Sears and Excel of the facts: that there was an ultrahazardous condition which existed in the vicinity by the presence of the uncapped gas line; and, there was not a hand lever to close the gas line in proximity (which both the National Fuel Gas Code Standards and Sears own delivery materials mandate).

c. The Sears/Excel contractors greatly increased the hazard of the open gas line, by installing the dryer directly in front of the gas line and effectively concealing the hazard.

10. The National Fuel Gas Code Standard is highly relevant in this case. The pertinent portion of the Standard, attached as Exhibit 5, provide in pertinent part, ANSI Z223.1-1996, 3.8.2 Cap All Outlets:

a. Each outlet, including a valve or cock outlet, shall be securely closed gastight with a threaded plug or cap immediately after installation and shall be left closed until the gas utilization equipment is connected thereto. Likewise, when the equipment is disconnected from an outlet and the outlet is not to be

used again immediately, it shall be securely closed gastight. Outlets shall not be closed with tin caps, wooden plugs, corks, or by other improvised methods.  
*Exception: Laboratory equipment installed in accordance with 5.2.2-a.*

b. The above provision does not prohibit the normal use of a listed quick-disconnect device. The basic concept here is that a plug or cap closure is required for all gas openings. Closing a valve is not enough to satisfy this requirement because the valve may be opened accidentally or by an unknowing person. No temporary or makeshift closure is permitted because anything except a cap or proper plug could leak. Listed quick-disconnect devices are permitted because they are required to have valving integral with the device that will shut off the gas either prior to or during the disconnect. An exception is made for laboratory equipment, such as Bunsen burners, which are connected (and disconnected) from hose-end valves as a normal everyday operation.

11. The National Fuel Gas Code Standard is highly relevant in this case. The pertinent portion of the Standard, attached as Exhibit 6, provide in pertinent part, ANSI Z223.1-1999, 5.5.4 Equipment Shutoff Valves and Connections:

a. Gas utilization equipment connected to a piping system shall have an accessible, approved manual shutoff valve with a nondisplaceable valve member, or a listed gas convenience outlet, installed within 6 ft (1.8 m) of the equipment it serves. Where a connected is used, the valve shall be installed

upstream of the connector. A union or flanged connection shall be provided downstream from this valve to permit removal of controls.

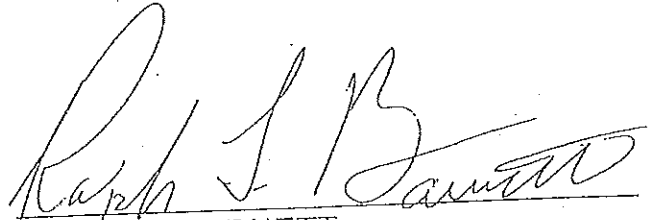
12. The depositions and documentary evidence in this case supplied by the Defendants, confirms that Sears and Excel would on occasions, remove from a home an existing gas dryer. These situations may include where, for instance: Sears had sold a new electric dryer, and would remove from the home an existing gas dryer at the time the new electric dryer was delivered, leveled and installed; or, a situation where a new gas dryer was delivered, and there was a problem with it so it was not installed and was instead removed and returned by Sears to its warehouse. These situations are expressly covered by the National Fuel Gas Code, as being ones in which there is a **mandate** that the gas line be capped airtight. So, Sears and Excel knew, or should have known a gas line **not** in use needed to be capped or plugged.

13. This house explosion and fire, and the resultant serious injuries, were **reasonably foreseeable** to Sears, Excel and its subcontractors. The documents of the Defendants, and those in the appliance community, themselves warn of the ultrahazardous nature of an electric dryer in the vicinity of flammable vapors. Further, the National Fuel Gas Code expressly indicates that a reason it mandates the capping of gas lines is because humans may inadvertently open the hand levers on gas line thereby allowing for the leakage of natural gas (when this

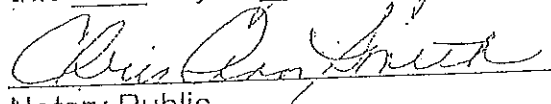
is done through inadvertence, the gas will **not** be allowed to escape through the gas line if it is plugged). Here, because Sears and Excel, through its contractors, failed to cap the gas line when they installed the dryer, they created an increased hazard.

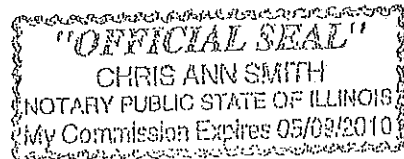
14. I am of the opinion Marcy Hill did, through inadvertence, open the gas line by turning the hand lever. Because Sears, Excel and its subcontractors had installed the electric dryer while not capping the gas line in the immediate vicinity (and effectively thereby concealing the hazard behind the dryer) the gas was allowed to escape in the environment and the explosion was triggered by Patricia Hill lighting a match.

15. Marcy Hill was not negligent, because she acted as a reasonable homeowner would under the same or similar circumstances. She did try to close the gas line, and when she smelled gas, she opened the windows and ultimately the gas smell dissipated leading her to believe there was no imminent threat. The fact that Marcy Hill did not vacate the home and call the gas company from a neighbor's home does not make her negligent. Indeed, many homeowners smell gas when they light a gas range or fireplace when the pilot is out, and then re-light the pilot and correct the situation without calling the gas company and vacating the home. Marcy Hill acted reasonable under the circumstances.

  
RALPH L. BARNETT

Subscribed and sworn to before me  
this 30 day of January, 2009.

  
Notary Public



# NATIONAL FUEL GAS CODE

Secretariats



INTERNATIONAL APPROVAL SERVICES - U.S., INC.  
(formerly I.G.A.)



National Fire Protection  
Association

An International Codes and Standards Organization



An American National Standard

ANSI Z 223.1

1996 EDITION

NFPA 54

ANSI Z 223.1 1996 NFPA 54

## 78. NATIONAL FUEL GAS CODE HANDBOOK

c. Outlets shall be located far enough from floors, walls, patios, slabs, and ceilings to permit the use of proper wrenches without straining, bending, or damaging the piping.

d. The unthreaded portion of gas piping outlets shall extend not less than 1 inch through finished ceilings or indoor or outdoor walls.

e. The unthreaded portion of gas piping outlets shall extend not less than 2 inches above the surface of floors or outdoor patios or slabs.

f. The provisions of 3.8.1-d and -e do not apply to listed quick-disconnect devices of the flush-mounted type. Such devices shall be installed in accordance with the manufacturer's installation instructions.

These provisions state what is obvious common sense. First, the outlet should be securely fastened in place (restating 3.3.6-a). The outlet should not be located behind doors, and should be mounted with sufficient clearance from surroundings as to permit proper use of wrenches. And last, an unthreaded section of pipe shall extend far enough from walls, floors, or ceilings so that wrench jaws can be applied to the pipe without damaging threads. The actual minimum length of pipe required is one inch from ceilings or walls, and two inches from floors. The greater length required for floor penetration will tend to protect the threaded portion from any spilled water, and it also gives the threaded region more leverage to resist physical damage from bumping or kicking.

### 3.8.2 Cap All Outlets:

a. Each outlet, including a valve or cock outlet, shall be securely closed gastight with a threaded plug or cap immediately after installation and shall be left closed until the gas utilization equipment is connected thereto. Likewise, when the equipment is disconnected from an outlet and the outlet is not to be used again immediately, it shall be securely closed gastight.

Outlets shall not be closed with tin caps, wooden plugs, corks, or by other improvised methods.

*Exception: Laboratory equipment installed in accordance with 5.5.2-a.*

b. The above provision does not prohibit the normal use of a listed quick-disconnect device.

The basic concept here is that a plug or cap closure is required for all gas openings. Closing a valve is not enough to satisfy this requirement because the valve may be opened accidentally or by an unknowing person. No temporary or

makeshift closure or proper plug. Listed quick-disconnect devices are required to shut off the gas. An exception: Bunsen burner hose-end valve.

Formal Interpretation  
Reference 3.8.2.

*Question:* Is it such [gas valve] connecting method?

*Answer:* No.

Issue Edition: 1  
Date: December

### 3.9 Branch Piping

a. Except on branch outlet piping and not from the

b. When a branch is known what size size as the line valve

Branch outlet on top or side of from the manholes.

The second is provided the full size available to

### 3.10 Manual

3.10.1 Valves provided upstream regulators are required at the

makeshift closure is permitted because anything except a cap or proper plug could leak.

Listed quick-disconnect devices are permitted because they are required to have valving integral with the device that will shut off the gas either prior to or during the disconnect.

An exception is made for laboratory equipment, such as Bunsen burners, which are connected (and disconnected) from hose-end valves as a normal everyday operation.

Formal Interpretation 80-2  
Reference 3.8.2, 3.5.2

*Question:* Is it the intent of 3.8.2-a or 5.5.2-a to preclude the use of such [gas valve] outlets as convenience outlets in a laboratory for connecting mobile laboratory equipment?

*Answer:* No.

Issue Edition: 1980  
Date: December 1983

### 3.9 Branch Pipe Connection.

a. Except on undiluted liquefied petroleum gas supply systems, all branch outlet pipes shall be taken from the top or sides of horizontal lines and not from the bottom.

b. When a branch outlet is placed on a main supply line before it is known what size pipe will be connected to it, the outlet shall be of the same size as the line which supplies it.

Branch outlets from horizontal mains shall be taken from the top or side to minimize the possibility of chips or dirt passing from the main to the smaller branches and connected appliances.

The second part of this section states that if a branch opening is provided for an unknown future load, the opening shall be the full size of the main to insure that the full flow of gas is available to the future, unspecified use.

### 3.10 Manual Gas Shutoff Valves (Also see 5.5.4).

**3.10.1 Valves at Regulators:** An accessible gas shutoff valve shall be provided upstream of each gas pressure regulator. Where two gas pressure regulators are installed in series in a single gas line, a manual valve is not required at the second regulator.

# NATIONAL FUEL GAS CODE HANDBOOK

Based on the 1988 Edition of ANSI Z223.1—NFPA 54,  
*National Fuel Gas Code*

THEODORE C. LEMOFF, P.E., Editor

First Edition

4-2-91



National Fire Protection Association  
Quincy, Massachusetts



American Gas Association  
Arlington, Virginia